SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 509.

THE UNITED STATES, PETITIONER,

vs.

SELGAS & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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a United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
SELGAS & CO., APPELLEES.
No. 1396.

Transcript of record on appeal from the Board of United States General Appraisers.

WILLIAM L. WEMPLE, *Assistant Attorney General, Attorney for Appellant.*

Printed under the direction of the clerk.

Press of Byron S. Adams, Washington, D. C.

Filed May 29, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

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1 *Petition.*

United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
v.
SELGAS & CO., APPELLEES.
No. 1396. Original.

To the Honorable the United States Court of Customs Appeals:

Your petitioner being dissatisfied with the decision of the Board of United States General Appraisers in each of the matters referred to in the annexed Schedule A, as to the assessment of duty on certain imported merchandise, and being dissatisfied also with the procedure of said board, as hereinafter specified, respectfully prays your court to review the questions involved therein, and for such relief in the premises as to the court shall seem just. The particulars of the errors of law and fact involved in said decision with which your petitioner is dissatisfied, are set forth in the annexed assignment of errors.

Dated, New York, N. Y., May 4, 1914.

WM. G. MCADOO,
Secretary of the Treasury, Petitioner.
By WM. L. WEMPLE,
Assistant Attorney General, Attorney for Appellant,
641 Washington Street, New York, N. Y.
F. L. L.

Assignment of errors.

The Board of United States General Appraisers has erred as follows:

1. In sustaining the protests herein.
2. In not affirming the assessment of duty herein.

3. In not holding that the protests herein were insufficient.

4. In holding that under subsection 7, paragraph J, section 4, tariff act of October 3, 1913, a discount of 5 per cent should have been allowed on goods imported in American vessels.

Schedule A.

Following are the importations and entries covered by this proceeding with such other data as are convenient for purposes of identification: Decided March 6, 1914. Port of New York.

2 Protest No. 727757/35463. Vessel, Havana. Entered Oct. 7, 1913. Entry No. 279190.

Endorsed: United States Court of Customs Appeals. Filed May 5, 1914. Arthur B. Shelton, clerk.

Mandate.

Mandate issued May 5, 1914.

ARTHUR B. SHELTON, *Clerk.*

Notice of appearance.

MAY 13, 1914.

Mr. ARTHUR B. SHELTON,
Clerk, United States Court of Customs Appeals, Washington.

SIR: Please take notice that we appear as attorneys for the appellees in the matter of the United States v. Selgas & Company, suit 1396, and we request notice of all proceedings therein be sent to us at the above address.

Respectfully,

McLAUGHLIN, RUSSELL, COX & SPRAGUE.
R. H. HILLIS.

Endorsed: United States Court of Customs Appeals. Filed May 15, 1914. Arthur B. Shelton, clerk.

Return of the board.

United States of America, Board of United States General Appraisers, New York, ss.

United States, appellant, vs. Selgas & Co., appellees. Board's Protest No. 727757. Collector's No. 35463. Suit No. 1396.

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said court, having by order, dated the 5th day of May, 1914, required the board to transmit to said court, the record, evidence, exhibits, and samples, 3 together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. The protest in question with the report of the collector thereon;
2. The stipulation of counsel;
3. A copy of the decision of the board, G. A. 7540 (T. D. 34246).

Witness the Honorable Jerry B. Sullivan, president of the board, this 15th day of May, A. D. 1914.

[SEAL.]

D. P. DUTCHER,
Acting Chief Clerk.

G. V. O.

Five per cent discount.

Protest 727757/35463.

NEW YORK, *Dec. 15, 1913.*

HON. COLLECTOR OF CUSTOMS, *Port of New York.*

SIR: Notice of dissatisfaction is hereby given with, and protest is hereby made against your ascertainment and liquidation of duties, and your decision assessing duty under the tariff act of October 3, 1913, on the mdse. covered by the entries below named. Said merchandise is not dutiable as assessed. In respect to each of said entries we claim as follows: That the duties assessed on said merchandise are subject to a discount of 5% for the reasons specified below.

We hereby give notice that this protest is intended to apply to all of the merchandise, articles, and payments included in or incident to the importations herein specified. The above claims are made under or by virtue of the tariff act of Oct. 3, 1913.

We further claim, under section 4, paragraph J, subsection
4 7 of the tariff act of 1913 a discount of 5% on all duties imposed by this act upon all merchandise covered by the entries herein specified, imported in vessels admitted to registration under the laws of the United States or imported in vessels as specified below, by virtue of treaties as specified below, or any subsequent treaty terminating or modifying any of said treaties.

We claim further that the duty on each and every item of merchandise covered by said entries is entitled to said 5% discount, both by virtue of said section 4, paragraph J, subsection 7, and by virtue of a treaty or treaties made between the United States and the country of exportation, or between the United States and the country where part or all of said merchandise was produced, or between the United States and the country under whose flag the vessel conveying said merchandise sails, or by either said section or said treaty or treaties.

We claim further that the duty on each and every item of merchandise covered by the entries herein specified is entitled to said discount of 5% by virtue of the fact that a discount of 5% is allowed or has been granted in the case of merchandise imported in a vessel of the registration of the United States, or has been allowed in the case of merchandise, the growth, production, or exportation of other countries or shipped in the vessels of other countries.

The excess is paid under compulsion to obtain and retain possession of said merchandise or articles, and the demand for the repayment thereof and a readjustment or liquidation of the entries in accordance with the claims is hereby made.

The marks and numbers below enumerated are subject to errors of omissions or otherwise and are given without prejudice.

Entry No. 279190. Date of entry, 10/7/13. Liquidated, 11/15/13. Vessel, Havana. How registered, American. Treaty, etc., specified below. Marks and Nos. various as per invoices and entries.

5 Treaties.

Algiers, 1815, 1816; Argentine Republic, 1853; Austria-Hungary, 1829; Belgium, 1845, 1858, 1863, 1875; Bolivia, 1858; Borneo, 1850; Brazil, 1828; Bulgaria, 1906; Chile, 1832, 1833; China, 1844, 1858, 1880, 1903; Colombia, 1824, 1846; Congo (Kongo), 1891; Corea (Korea), 1882; Costa Rica, 1851; Canada, 1911; Cuba, 1902; Denmark, 1826; Dominican Republic, 1867; Ecuador, 1839; Egypt, 1884; Ethiopia, 1903; France, 1778, 1800, 1822, 1898, 1902, 1908; German Empire, 1871, 1900, 1906, 1907; Great Britain, 1794, 1815, 1827, 1902; Greece, 1837; Hanover, 1840, 1846, 1861; Hanseatic Republics, 1827; Hayti, 1864; Honduras, 1864; Italy, 1871, 1900, 1909; Japan, 1854, 1857, 1858, 1864, 1866, 1878, 1894, 1911; Liberia, 1862; Madagascar, 1867, 1881; Mecklenberg-Schwerin, 1847; Mexico, 1831, 1883, 1885, 1886; Morocco, 1787, 1836; Muscat, 1833; Netherlands, 1782, 1839, 1852, 1907; Nicaragua, 1867; Oldenberg, 1847; Orange Free State, 1871; Ottoman Empire, 1830, 1862; Paraguay, 1859; Persia, 1856; Peru-Bolivia, 1836; Peru, 1851, 1870, 1887; Portugal, 1840, 1899, 1902; Prussia, 1785, 1799, 1828; Russia, 1832; Salvador, 1850, 1870, 1873; Samoan Islands, 1878, 1889; Sardinia, 1838; Servia, 1881; Siam, 1833, 1856; Spain, 1795, 1884, 1888, 1906, 1909; Sweden, 1783; Sweden and Norway, 1816, 1827; Switzerland, 1850, 1906; Tonga, 1886; Tripoli, 1796, 1805; Tunis, 1797, 1824; Two Sicilies, 1845, 1855; Venezuela, 1836, 1860; Zanzibar, 1886; and all favored nation or reciprocal agreements, treaties, conventions, and proclamations by the United States or between the United States and either of the nations specified above or any other nations.

SELGAS & CO.
By THADDEUS S. SHARRETTS,
Office and P. O. address, 165 Broadway, New York City.
McLAUGHLIN, RUSSELL, COE & SPRAGUE.

Endorsed: Custom house, New York. Received Dec. 15, 1913.

6 *Report of the collector.*

JAN. 10, 1914.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the provisions of the act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

DUDLEY FIELD MALONE, *Collector.*

Stipulation.

The Board of United States General Appraisers.

In the matter of protest No. 727757/35463 of Selgas & Co.

It is hereby stipulated and agreed in the case of the above protest covering entry No. 279190—S. S. Havana, mdse.—tobacco.

1. That the tobacco in question was imported in the S. S. Havana, of the Ward Line, subsequent to Oct. 3, 1913.

2. That said S. S. Havana is and was at the time of shipment a vessel admitted to registration under the laws of the United States.

3. That the above protest shall be submitted on this stipulation and briefs to be filed.

WM. L. WEMPLE,
Assistant U. S. Attorney General for the United States.
THAD. S. SHARRETTS,
For the Importers.

Endorsed: U. S. Gen. Apprs. Received Jan. 15, 1914.

7 *Decision of the board.*

(T. D. 34246—G. A. 7540.)

United States General Appraisers, New York, March 6, 1914.

In the matter of protests 726469, 727757, etc., of J. Elliott & Co., Selgas & Co., et al., against the assessment of duty by the collector of customs at the port of New York. Before Board 3.

WAITE, General Appraiser: The tariff act of 1913, passed by Congress and approved by the President on the 3d day of October of that year, went into effect, according to the terms of the statute, on the following day. That act provides in some 386 different paragraphs for duties to be levied upon certain commodities imported into the United States. Among other provisions in the statute is subsection 7 of paragraph J of section 4, providing in substance that 5 per cent discount shall be allowed upon goods imported into the United States in vessels subject to registration therein, provided that said subsection 7 shall not be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation. Since this law went into effect dutiable goods from various countries of the world have been imported into the United States in vessels subject to registry in the United States, as well as in vessels subject to registry in other countries. Upon demand by the importers of goods in American vessels for a reduction of the duty by 5 per cent, as seems to be provided for in said subsection 7 of paragraph J, the collectors of the various ports where entries have been made have refused to make the reduction, and it appears from the briefs and records filed in the cases before us that this refusal has been prompted by an order from the Secretary of the Treasury, based upon an opinion by the Attorney General. The instruction to collectors, found in T. D. 33847, states that the Attorney General has advised that—

8 "The 5 per cent discount to American vessels only, which was the primary object of the subsection, can not be given without impairing the stipulations of existing treaties between the United States and various other powers, and that consequently the subsection, by the express terms of the proviso, is inoperative."

This opinion is evidently based upon the fact that there are existing between the United States and various countries treaties containing clauses known as the "most-favored-nation clauses"; and also treaties containing clauses which more specifically provide for reciprocal arrangements on behalf of the importation of goods into the United States and also into the country of the other contracting party; and also other clauses providing for equivalent or reciprocal courtesies as between other countries and the United States with reference to the importation of the products of the parties to the treaty into the ports of the other contracting party. Notably the latter is found in the treaty between the United States and Great Britain.

Succinctly stated, then, the claim of the Government is that subsection 7 is inoperative, and that no reduction of duty can be allowed upon goods arriving in the United States in American vessels. If this contention is sustained, that, as will be apparent, is the end of the case.

It is urged with considerable earnestness by the Government that because there are few importations in vessels of countries with whom we have not commercial treaties such as are here involved, and because of the consequent slight benefit to American shipping which would accrue should the law be enforced as written, therefore it was intended to postpone the enforcement of the law until the existing treaties should be abrogated, abandoned, or expire by lapse of time; that to enforce it now would place Congress in the absurd position of having enacted a law for so trifling a purpose.

9 We can not concur in this view. In our estimation, to place the law upon the statute books intending that it should

not be enforced would be much more absurd, it being conceded that there is subject matter over which it can operate. We are bound to apply the law so far as it is applicable to the present status, even though it results in benefits to shipping or shippers of other countries. We see nothing illogical or absurd in the thought that Congress enacted the law with the intent that it should be administered so as to most nearly accomplish its plain intent and purpose, with broadening field of operation, as treaties may be changed, abrogated, or expire by lapse of time.

The claim on the part of the importers is that the law should be enforced; that a reduction should be allowed to goods arriving in American vessels, and that such allowance being made, the same reduction of 5 per cent should be allowed upon all goods arriving in the United States in vessels of the countries with whom the United States has such commercial treaties as are above set forth. It is agreed that these questions shall be determined in one decision in case the contention of the Government is denied with reference to goods in American bottoms.

The statute which it is claimed is inoperative reads as follows:

"J. Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: Provided, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The language of this paragraph seems to be plain. In our judgment there is nothing left for construction. There seems
10 to be no ambiguity in the language used. It must be conceded that the meaning of the word "affect" is practically the same as that of "impair," to wit, to make the treaty less beneficial to the other contracting party, or "affected" to the detriment of such party. There being in our judgment no ambiguity in this statute, the rule for its interpretation and construction is plain. In United States v. Goldenberg (168 U. S., 95), this being what may be termed a "tariff case," the court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

And in Bate Refrigerating Co. v. Sulzberger (157 U. S., 1, 36, 37) the following language was used:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden v. Collector (5 Wall., 107, 111), 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to
11 rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature.'"

The same principle was applied by the Circuit Court of Appeals in the Eighth Circuit to the construction of the tariff law in Rice v. United States (53 Fed., 910, 911):

"The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear. Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It can not substitute for the clear expressions which Congress has actually used other expressions, which the court think Congress ought to have used."

Very many more citations might be made to this point. We deem it unnecessary, however, as, in our opinion, there is but one rule for the construction of a statute written in plain language, as the one now under consideration.

It must be borne in mind also that we must avoid giving the proviso of the statute such a construction as will make the proviso repugnant to the body of the act. Savings Bank v. United States (19 Wall., 227).

It is urged, however, that the enforcement of this statute as it is written will abrogate or impair the provisions of some treaty with a foreign country now in force. We fail to see how there could be any construction placed upon it which would abrogate, impair, or affect the provisions of any treaty to which our attention has been called. Let us examine the provisions which it is claimed it will impair.

The most-favored-nation clauses in treaties are practically identical. As typical of these clauses, the most-favored-nation clause in the treaty of 1875 with Belgium may be quoted:

12 "If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional."

The clauses providing for specifically reciprocal favors are to the effect that the United States will not levy any higher rate of duty upon goods imported into the United States in the vessels of the other country than are levied upon goods brought into the United States in its own vessels; and, reciprocally, it is provided that the other party to the treaty will not levy any greater rate of duties upon goods brought into its country in American vessels than is levied upon goods imported in its own vessels.

It is apparent that these treaties anticipate future changes in the tariff laws of the United States, similar to subsection 7, but they must be held to have been made with full knowledge of the constitutional limitations of the treaty-making branch of the Government. They are intended to apply to a future condition. Can it be said that when such condition arises, ant the scope and bearing of the treaty are extended to cover a condition anticipated when it is entered into, that that violates or abrogates the treaty, or impairs it in any manner? We think not. It rather tends to enlarge the scope of it and increases the benefits to be derived thereunder. Hence we hold that, even though this law is made operative to its fullest extent, and the reduction given of 5 per cent upon goods imported in American bottoms, it will not have the effect of abrogating or impairing any treaty. We therefore find that the law must be so administered as to allow 5 per cent discount from the duty on goods imported in American vessels.

This leads us to consider the question which naturally arises over the importation of goods in other than American
13 vessels. It is not the province of the court to abrogate a treaty, or even to determine whether it is in force, unless it be self-executing.

Let us first consider the question as to whether the enforcement of this statute compels a recognition of the right of treaty powers, under the most-favored-nation clauses, to the same concession or right extended to goods brought in in vessels subject to American registry, as provided in this statute.

This is not a statute extending a favor to any particular country. It is rather an offer made by the United States to importers, whether they be from one country or another, or whether they be from a place not within the jurisdiction of any country. The same privilege is extended to England as to France, or Germany, or Italy; that is, to bring in goods in American vessels and receive the 5 per cent discount from the regular duties of the tariff act. We do not think this violates the provisions of the most-favored-nation clause. And, further, we are of the opinion that if this act could be construed to be a preference extended to any nation with which we have dealings, the favor is extended for a consideration; that is, a party must go to the trouble to seek out American ships. This may involve, and probably does, extra trouble and expense in the selection of the vessel, in the assembling of the goods, in preparation for shipment, and possibly in the extra effort necessary to procure an American vessel.

Holding these views, we see no necessity for citing or applying in this connection what seems to be the latest expression of the courts upon the self-executing qualities of most-favored-nation clauses, as found in American Express Co. v. United States (4 Ct. Cust. Appls., 146, T. D. 33484), known as the wood-pulp cases.

There is, however, another phase of this case presented for consider-
ation which needs, in our judgment, more extended discussion,
14 to wit, the question whether the specific commercial treaties,
the provisions of which are exemplified by the following
quotations from the treaty of 1829 with Austria-Hungary, are self-
executing, such as can be enforced by judicial mandate.

"Article III.

"All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which may be lawfully imported into the ports of the dominions of Austria, in Austrian vessels, may also be so imported in vessels of the United States of America without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishment whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States in vessels of the said States may also be so imported in Austrian vessels without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

"Article IV.

"To prevent the possibility of any misunderstanding, it is hereby
declared that the stipulations contained in the two preceding articles
are, to their full extent, applicable to Austrian vessels and their
cargoes arriving in the ports of the United States of America;
15 and reciprocally, to vessels of the said States and their car-
goes arriving in the ports of the dominions of Austria, whether
the said vessels clear directly from the ports of the country to which
they respectively belong, or from the ports of any other foreign coun-
try." (Treaties, Conventions, International Acts, Protocols, and
Agreements between the United States and Other Powers, 1776–1909,
vol. 1, p. 30; 8 Stat. L., 228.)

The substance of the commercial treaties, of which there are many, dealing specifically with the importation of goods and the entry of vessels into the ports of the various contracting parties, while varying in the letter, are practically the same in substance and, so far as the decision in this case is concerned, may be treated as though they were alike.

The first question to be decided in this connection is as to whether these treaties are executory, whether they are agreements between the high contracting parties to be performed in the future, and whether they should receive the sanction of the legislative branch of the Government before the question of their enforcement may be submitted to judicial tribunals. Importers' briefs cite American Express Co. v. United States, supra (wood-pulp case), as authority for holding that these treaties are self-executing. We do not think that decision is warrant for so holding. In the first place the articles of the treaties under consideration there, and upon which the determination in that case depended, were the favored-nation clauses. Much stress was laid upon the language in the favored-nation clauses which is not found in these specific agreements, to wit: "It shall immediately become common to the other party." It was there held that this language implied that it was intended the law should, and as a matter of fact did, operate ex proprio vigore. The decision in that case is, in our opinion, slight authority for holding that such treaties as are now before us would be so considered. As we read the decisions upon this point the Court of Customs Appeals
16 has extended the rule quite as far as, if not beyond, that laid down by the Federal courts in the various decisions. We are not disposed to take a position which is more liberal than that assumed by the Court of Customs Appeals. We are of the opinion that these treaties are not self-executing.

In view of the obvious purpose of Sections VII and VIII of Article I of the Constitution of the United States, the most that can be said with reference to the specific treaties here under discussion is that they were entered into with full knowledge that they should be operative only after they had received the approval of Congress.

The question as to whether the interpretation or enforcement of a treaty provision is a political question or one to be submitted to the judicial branch of the Government has been discussed by the courts from a very early period. One of the early decisions dealing with the question of how far the courts may go in enforcing the terms of a treaty is that of Foster v. Neilson. (2 Pet., 253.) Chief Justice Marshall in that opinion used the following language (p. 314):

"Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation *import a contract when either of the parties engages to perform a particular act* the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court." [Italics are ours.]

These treaties imply a contract. Of necessity they must be held to

have reference to something in the future from the time of ratification. They stipulate for the performance of acts, certain of which are to be performed outside the territory of the United States. The courts have no means of determining whether they are in
17 force and lack jurisdiction to compel the enforcement of the
provisions in question except in so far as they might say the favor should be extended to the foreign power, whether or not the arrangement was reciprocal, and like favors extended to the United States.

The Constitution provides (Art. VI, clause 2) that it, the statutes, and treaties shall be the supreme law of the land.

Treaties, so far as the courts are concerned, are upon the same basis as statutes if they are such as come within the purview and jurisdiction of judicial authority. It must be borne in mind, however, that treaties are international; that the subjects provided for in treaties are numerous and entirely outside the judicial sphere. The political branch of the Government is charged with the responsibility of seeing that treaty promises are kept, and the treaty-making power is limited, apparently, in its field of negotiations only by the Constitution of the United States and the pleasure and inclination of the other high contracting parties.

The case of Taylor v. Morton (2 Curtis, 454; 23 Fed. Cas., 784) is instructive upon the question as to what is and what is not a self-executing treaty. The language of Mr. Justice Curtis in that decision furnishes a very clear rule, it seems to us, for the treatment of the cases at bar. In that case a treaty between Russia and the United States was under consideration, the terms of which, in our judgment, are similar to the terms of the treaties here in question. Judge Montgomery, in the wood-pulp cases, seems to question the applicability of the decision in Taylor v. Morton to the question arising under the most-favored-nation clauses. In our judgment, however, there can be no distinction between the case as stated by Mr. Justice Curtis in Taylor v. Morton and the specific provisions in the treaties immediately applicable to the question here under discussion. Mr. Justice Curtis said:

"We may approach this question, therefore, free from any of that anxiety respecting the preservation of our national faith
18 which can scarcely be too easily awakened or too sensibly felt.
For this question, in that aspect of it, is not whether the act of Congress is consistent with the treaty but whether that is a judicial question to be here tried."

And, further:

"Is it a judicial question whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative, have given just occasion to the political departments of our

Government to withhold the execution of a promise contained in a treaty or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them, but to the executive and the legislative departments of our Government. They belong to diplomacy and legislation, and not to the administration of existing laws."

The clause in the Russian treaty under consideration by Mr. Justice Curtis is found in Article VI of the treaty with Russia of December 18, 1832, which reads:

"No higher or other duties shall be imposed on the importation into the United States of any article the produce of manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia of any article the produce or manufacture of the United States than are or shall be payable on the like article being the produce or manufacture of any other foreign country."

The decision in Taylor v. Morton continues:

"The truth is that this clause in the treaty is merely a contract addressing itself to the legislative power. The distinction between such treaties and those which operate as laws in courts of justice is settled in our jurisprudence."

19 Then follows the citation of Foster v. Neilson (2 Pet., 314), supra, with quotations therefrom.

It seems to us plain that the courts, not having power to abrogate a treaty or to determine whether it is in force, would not assume jurisdiction to enforce its contractural provision, some of which are enforceable only outside their jurisdiction. The courts of the United States would not assume to say to a foreign country, "Do this" or "Do that," to conform to the stipulations in a treaty made with the United States; and not having power to do so, they will not assume to direct the actions of the other contracting party, but will rather treat the questions as political, to be left to diplomacy and international negotiations.

All the treaties here in question have reciprocal provisions, hence are enforceable in their entirety in two jurisdictions.

There may be some confusion in the authorities as to whether the provisions of a treaty are executory; but as we understand the rule laid down by the decisions, there is no authority for holding that treaties which provide for the performance of certain agreements in the future are self-executing.

There is another aspect of this case with reference to these particular treaties which we desire to consider. The Constitution reads (Art. VI, clause 2):

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; * * *."

While no distinction seems to be made in this article between the Constitution, the statutes, and the treaties, the necessity for consistent judicial interpretation has placed the Constitution superior to the statutes and the treaties, and we think that neither statute nor treaty can be enforced by the courts which is contrary to the
20 letter or spirit of the Constitution. And a specific grant of power in the Constitution, or any special designation of a subject matter which is clearly within the scope of either branch of the Government, can not be usurped or infringed upon by another branch.

Article I, section 7, clause 1, of the Constitution provides:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills."

Section 8 of the same article provides:

"The Congress shall have power:

"1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

In view of these provisions, it seems to us necessary to inquire whether the treaty-making power, in entering into these treaties, has not infringed upon the field especially reserved in the Constitution to the House of Representatives and to Congress. Our views are expressed in the language of Mr. Blaine, Secretary of State, found on page 169 of the fifth volume of Moore's International Law Digest:

"A treaty, no less than the statute law, 'must be made in conformity with the Constitution, and where a provision in either a treaty or a law is found to contravene the principles of the Constitution such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the Government and the Nation.'"

Mr. Wharton, in his International Law Digest, Volume II, page 26, section 131a, says:

"That a treaty can not invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition
21 which it has received from no other writer in our own tongue. 'Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the "treaty-making power" be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and the Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives.'"

So we may say here that if the President and the Senate, by their power to make treaties, can, by a treaty previously entered into, in any way hamper, limit, or embarrass the House of Representatives in its legislation upon the question of revenues, or Congress within the sphere of its constitutional privilege to levy and collect duties, they may by a subsequent treaty annual and destroy the rights reserved in the Constitution to control legislation upon these specific and particular matters, and overturn the whole system of revenue laws, no matter how carefully considered or elaborately and efficiently planned.

The revenues of the United States are raised largely from the imposition of import duties. The law of which subsection 7 is a part is framed according to a policy and according to the requirements of the Government. In our opinion it was not intended that there should rest within the treaty-making branch the power to disturb or prevent the free exercise of the judgment of Congress as to the rate and amount of duties to be levied upon imports; once having been so determined, such determination can not be disturbed or set aside except with the consent of Congress. In other words, while a treaty which assumed to interfere in that way with the constitutional prerogative of Congress might be valid and enforceable as between the two nations, the courts would be unable to
22 grant relief under such a treaty. Claims arising under the
provisions of a treaty, not self-executing, either from a citizen or a foreigner, would have to be made to those who alone are empowered by the Constitution to consider and adjust such claims.

Mr. Justice Curtis, in Taylor v. Morton, supra, said:

"The powers to regulate commerce and to levy duties are as expressly given as the power to declare war; and the former are as absolute and unrestrained as the latter."

The Constitution in Article I, section 8, clause 11, provides that Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

Would anyone contend that, in spite of this provision of the Constitution, the treaty-making power of the Government, the President and Senate, would have power to declare war? We think not.

How far the President and Senate are authorized to go in making self-executing treaties independently of the sanction of the House of Representatives and Congress has been discussed from the time of the first administration. One of the questions presented was as to how far a treaty could embrace commercial regulations so as to be obligatory upon the Nation and upon Congress. This question has been debated from time to time with great zeal and learning in both houses of Congress. See Story on the Constitution (vol. 2, chap. 42, and notes). The learned commentator concludes this chapter with the following observation in section 1842:

"From this supremacy of the Constitution and laws and treaties of the United States, within their constitutional scope, arises the duty of courts of justice to declare any unconstitutional law passed by Congress or by a State legislature void. So, in like manner, the same duty arises whenever any other department of the National or State Governments exceeds its constitutional functions."

23 A very clear exposition of the question as to how far the President, with the advice and consent of the Senate, can go in making treaties which are enforceable independently of the consent of the House of Representatives and Congress is found in a report by Mr. J. R. Tucker, chairman of the Judiciary Committee of the House, Forty-ninth Congress, second session. The document is known as House Report No. 4177. See also Tucker on Constitutional Law (vol. 2, sec. 354, et seq.).

Reference is here also made to a report by Mr. Rufus Choate for the Committee on Foreign Affairs of the Senate (Senate Journal, first session, Twenty-eight Congress, page 445 et seq.) Among other things he states the following upon this subject:

"In the judgment of the committee the legislature is the department of Government by which commerce should be regulated and laws of revenue be passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress."

We conclude that subsection 7 of paragraph J of section 4, tariff act of 1913, should be enforced according to its letter—

That dutiable goods imported in vessels admitted to registration under the laws of the United States should be conceded a 5 per cent discount from the duties provided for in the other parts of the statute;

That the most-favored-nation clauses in treaties with foreign countries are not applicable to the questions at issue here, as subsection 7 does not extend any special favor to any particular country, 24 but is an offer or promise by the United States to importers, wherever residing, for the benefit of American shipping, with incidental benefits to the importer; that it is not gratuitously given in any sense of the word, but is in consideration of the necessary trouble and expense incumbent upon the shipper who selects American vessels, and the enforcement of the law does not abrogate or in any manner impair or affect the provisions of any treaty;

That the more specific commercial treaties here in question are not self-executing; they are executory; and the question of their application is a political one and not within the jurisdiction of the courts. And, besides, they can not be recognized and enforced by the courts for the reason that they are opposed to the spirit and letter of the

Constitution. The clauses in question in these treaties are merely contracts, which address themselves to the legislative power.

We therefore, as stated above, sustain the protests where the goods are imported in vessels subject to American registry, and overrule the protests where the goods are imported in vessels not subject to American registry.

There is still one other question to be considered—that is, as to what duty shall be imposed upon goods entered under the laws of 1909 for warehouse and not withdrawn until the law of 1913 went into effect. If such goods were imported in vessels not of American registry, the duty to be imposed would be that which is provided for in the appropriate sections of the law of 1913 in force at the time of withdrawal. If they were imported in American vessels, it might be thought another rule would apply, to wit, that the 5 per cent discount being in force at the time of withdrawal, said entries should be given the benefit thereof. We are of the opinion, however, that the benefit was intended to be extended only to those ships which imported goods under the law of 1913. It may be noted that the language of subsection 7 is that the discount shall be allowed on goods which "shall be imported," which implies a future importation.

25 Paragraph Q of section 4, tariff act of 1913, provides that goods in warehouse "shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof." As we read the statute, subsection 7 does not impose a duty; it grants a reduction for certain considerations. The "duties imposed by this act" are such as are specifically enumerated in the first 386 paragraphs of the act. This applies to protest 726469, which covers goods imported in a vessel admitted to registry under the laws of Great Britain and withdrawn from warehouse subsequent to October 3, 1913; and protest 726816, which covers goods imported in a vessel admitted to registry under the laws of Belgium and withdrawn from warehouse subsequent to the act of 1913. This claim made by importers is therefore overruled.

The protests here involved have been submitted upon stipulations between counsel showing the countries to which the various vessels belong, as set forth in the following schedule:

Austria-Hungary, protest 726867; Belgium, protests 726816 and 726868; Germany, protests 727395 and 727502; Great Britain, protests 726469 and 726898; Italy, protest 726470; Netherlands, protests 726808, 727693, 728560, and 729239; Norway, protest 727394; Spain, protest 726810; United States, protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757.

We therefore sustain protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757, which cover goods imported in American vessels; and overrule protests 726469, 726470, 726808, 726810, 726816, 726867, 726868, 726898, 727394, 727395, 727502, 727693, 728560, and 729239, which cover goods imported in foreign vessels.

BYRON S. WAITE,
H. M. SOMERVILLE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

Endorsed: United States Court of Customs Appeals. Filed May 21, 1914. Arthur B. Shelton, clerk.

26 United States Court of Customs Appeals.

THE UNITED STATES,
v.
SELGAS & COMPANY.
No. 1396.

Certificate of the Attorney General.

In pursuance of the act entitled "An act to amend section 195 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No 1396, The United States v. Selgas & Co.," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

27 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
SELGAS & CO., APPELLEE.
No. 1396.

The above-entitled appeal was argued by counsel and taken under advisement by the court on November 10, 11, and 12, 1914.

28 United States Court of Customs Appeals.

TUESDAY, *May 25, 1915.*

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of May, A. D. 1915.

Present, the Honorable Robert M. Montgomery, presiding judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries, and George E. Martin, associate judges.

The court was opened for business in due form.

No. 1346.
The M. H. Pulaski Co., Johnson & Faulkner, John Pullman & Co., appellants,
v.
The United States, appellee.

No. 1353.
R. B. Henry Co., Wiener Brothers, Lehn & Fink, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., J. Wile Sons & Co., appellants.
v.
The United States, appellee.

No. 1355.
J. Elliott & Co., Samstag & Hilder Brothers, appellants,
v.
The United States, appellee.

No. 1364.
Robert Muller & Co., appellant,
v.
The United States, appellee.

No. 1370.
Wood & Selick, Louis Meyers & Son, appellants,
v.
The United States, appellee.

No. 1391.
The United States, appellant,
v.
J. Wile Sons & Co., appellee.

29 No. 1392.
The United States, appellant,
v.
G. W. Faber (Inc.), appellee.

No. 1393.
The United States, appellant,
v.
Louis Meyers & Son, appellee.

No. 1394.
The United States, appellant,
v.
William Openhym & Sons, A. Wimpfheimer & Bro., appellees.

Said appeals having heretofore been brought on to be heard before the court, and due consideration thereon having been had, it is ordered:

(1) That the merchandise involved in these cases, imported in the registered vessels of the United States, is entitled to the five per cent discount as held by the Board of United States General Appraisers, whose decision relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of the tariff act of 1913, as well as that which was brought to our ports prior thereto and entered in bond for warehousing, subsequently withdrawn for consumption and duties paid, the five per cent discount must be allowed, and with respect to such merchandise the decision of said board is hereby reversed.

(3) That the merchandise imported in vessels of our registry before the tariff act of 1913 took effect which was entered in bond for warehousing, subsequently withdrawn and entered for consumption and duties paid, is entitled to the five per cent discount thereon, and the decision of said board with respect thereto is reversed.

(4) That the merchandise from Cuba is entitled to the reduction of twenty per centum ad valorem provided by the Cuban treaty, and the further discount of five per centum ad valorem from the amount so ascertained. As to such importations the de-

No. 1395.

The United States, appellant,
v.
Park & Tilford, appellee.

No. 1396.

The United States, appellant,
v.
Selgas & Co., appellee.

No. 1399.

E. La Montagne's Sons, appellants,
v.
The United States, appellee.

No. 1410.

Cullman Brothers, E. Rosenwald & Bro., appellants,
v.
The United States, appellee.

No. 1440.

A. Lorsch & Co., Henry Glass & Co., F. L. Kraemer & Co., L. D. Bloch & Co., A. Leipzig (Inc.), A. J. Dale, appellants,
v.
The United States, appellee.

cision of said board is hereby affirmed.

And said appeals are remanded to said board for proper action in the premises.

De Vries, associate judge, dissents.

* * * * * * *

(Signed) Robert M. Montgomery,
Presiding Judge.

30 United States Court of Customs Appeals.

The United States, appellant,
vs.
Selgas & Co., appellee.
No. 1396.

For the opinion of the court in the above-entitled appeal see transcript of record in the case of R. B. Henry Co. et al., appellants, v. The United States, appellee, No. 1353.

31 United States Court of Customs Appeals.

The United States, appellant,
vs.
Selgas & Co., appellee.
No. 1396.

I, Arthur B. Shelton, clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages contain a true and complete transcript of the record and proceedings had in said court in the above-entitled appeal as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 11th day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON, *Clerk.*

32 United States of America, ss.

The President of the United States of America to the honorable the judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which The United States is appellant and Selgas & Company are appellees, No. 1396, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Customs Appeals and re-
33 moved into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

34 (Indorsed:) File No. 24,790. Supreme Court of the United States, No. 1046, October term, 1914. The United States vs. Selgas & Company. Writ of certiorari.

35 In the Supreme Court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
SELGAS & COMPANY.
No. 1046.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO. W. DAVIS,
Solicitor General.
RUFUS W. SPRAGUE, JR.,
Counsel for Respondent.

JUNE 25, 1915.

Filed June 25, 1915. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

36

Return to writ.

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The United States v. Selgas & Co., No. 1396, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.]

ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

(Stamped:) Office of the clerk Supreme Court U. S. Received June 29, 1915.

37 (Indorsed:) File No. 24,790. Supreme Court U. S., October term, 1915. Term No. 509. The United States, petitioner, vs. Selgas & Company. Writ of certiorari and return. Filed June 29, 1915.

(Indorsement on cover:) File No. 24,790. U. S. Court of Customs Appeals. Term No. 509. The United States, petitioner, vs. Selgas & Company. Petition for writ of certiorari and exhibit thereto and waiver of notice of submission. Filed June 12, 1915. File No. 24,790.

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FILED
FEB 17 1916
JAMES D. MAHER
CLERK

FIVE PER CENT. DISCOUNT CASES.

149 162
Nos. 4[illegible]6 to 5[illegible].

In the Supreme Court of the United States,

OCTOBER TERM, 1915.

THE UNITED STATES, PETITIONER,

v.

THE M. H. PULASKI CO. ET AL.
SAME *v.* R. B. HENRY CO. ET AL.
SAME *v.* JAMES ELLIOTT & CO. ET AL.
SAME *v.* J. WILE SONS & CO.
SAME *v.* ROBERT MULLER & CO.
SAME *v.* WOOD & SELICK ET AL.
SAME *v.* E. LA MONTAGNE'S SONS.
SAME *v.* ALBERT LOBSCH & CO. ET AL.
SAME *v.* CULLMAN BROS. ET AL.
SAME *v.* G. W. FABER, INC.
SAME *v.* LOUIS MEYERS & SON.
SAME *v.* WILLIAM OPENHYM & SONS ET AL.
SAME *v.* PARK & TILFORD.
SAME *v.* SELGAS & CO.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

BRIEF FOR THE RESPONDENTS.

APPEAL PRINTING COMPANY, NEW YORK.

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I. The subsection is plain and without ambiguity. By its first clause the discount is granted on goods imported in American vessels, and by the proviso, discrimination against nations with which we have reciprocal commercial agreements is precluded and so the discount is extended to imports in their vessels 7-13

The meaning of the section must be determined from the words in which it is expressed, and resort to extrinsic aids is permissible only in case the law is not self explanatory 7

Weber v. *Freed,* 239 U. S., 325, 330.
Dewey v. *United States,* 178 U. S., 510, 521.
Hamilton v. *Rathbone,* 175 U. S., 414, 419.
United States v. *Goldenberg,* 168 U. S., 95, 102.

The law is to be considered in its entirety, the principal clause and the proviso together as one expression of legislative intent 7

White v. *United States,* 191 U. S., 545, 551.
Dollar Savings Bank v. *United States,* 19 Wall., 227.

The principal clause is a plain statement of a single and simple proposition: In determining the duties on imports in American bottoms the schedule rates are to be discounted five per cent. 7-8

The proviso implies that existing treaties may be abrogated or in some manner impaired or affected by the principal clause, and forbids a construction of the Act which will have such effect 8

Reference must be made to the treaties to ascertain if by any possible construction or operation of the Act they may be abrogated, impaired or affected 8

Art. V. Treaty with Italy, 1871.

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The treaty-making power of the United States is a law-making power, as much so as the Congress. Treaty and statute are of equal rank, and must be construed if possible so that both shall stand, but if inconsistent, the last in date will control..9-10

U. S. Constitution, Art. VI.

Whitney v. *Robertson,* 124 U. S., 190, 194.

United States v. *Lee Yen Tai,* 185 U. S., 213.

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Treaty with Great Britain, 1815.

Act of March 1, 1816 (3 Stat., 255, c. 22).

14th Annals of Congress, 1st Session, p. 674. *Ibid.,* pp. 46, 49-50.

Reports of Committee on Foreign Relations, 1789-1901, Vol. 8, p. 25.

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Treasury Decision, 20386.
Foreign Relations U. S., 1899, p. 740 *et seq.*
Act August 30, 1842 (5 Stat., 560).
Bartram *v.* Robertson, 122 U. S., 116, *compared.*
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Foster & Elam v. *Neilson,* 2 Peters, 253, *explained.*
United States v. *Percheman,* 7 Peters, 51, 89.
United States v. *Schooner Peggy,* 1 Cranch., 103.
Ware v. *Hylton et al.,* 3 Dallas, 199.
Hauenstein v. *Lynham,* 100 U. S., 483.
United States v. *43 Gallons of Whiskey,* 93 U. S., 188.
Tucker v. *Alexandroff,* 183 U. S., 424, 429.
Oldfield v. *Marriott,* 10 How., 146.
Geofroy v. *Riggs,* 133 U. S., 258, 267.
Rainey v. *United States,* 232 U. S., 310, 316.
Head Money Cases, 112 U. S., 580, 598.
DeLima v. *Bidwell,* 182 U. S., 1, 195.
Taylor v. *Morton,* 2 Curtis, 254, *distinguished.*

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McLean v. *United States,* 226 U. S., 374, 383.
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Georgia R. & B. Co. v. *Smith,* 128 U. S., 174, 181.
Interstate Commerce Commission v. *Baird,* 194 U. S., 25, 36.
A rational interpretation will be given to a statute and a proviso and not one by which the statute will, through the proviso, destroy itself........26-27
Adams Express Co. v. *Croninger,* 226 U. S., 491.
United States v. *Mille Lac Chippewas,* 229 U. S., 498.

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Explaining or distinguishing:
United States v. *Cantril,* 4 Cranch., 167.
City of Mobile v. *Eslava,* 16 Peters, 234, 247.
In re Hendricks, 60 Kans., 796.
Farmers' Bank v. *Hale,* 59 N. Y., 53.
International Harvester Company v. *Kentucky,* 234 U. S., 216.
Texas & Pacific Railway v. *Interstate Commerce Commission,* 162 U. S., 197, 254.
The provision is not self-contradictory, nor contradictory of the reason of the legislation and the purpose of the legislators, which was discrimination in favor of American shipping. Upon the contrary, the statute is responsive to that reason and in aid of that purpose....................29-31
Pirie v. *Chicago Title and Trust Co.,* 182 U. S., 438, 451.
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United States v. *Plowman,* 216 U. S., 372, 375.
Unity v. *Burrage,* 103 U. S., 447, 456.

It is not permitted under any rule of statutory construction to say that the proviso was a stroke of legislative *finesse,* designed by the Senate to nullify the section as formulated by the House, under pretense of merely qualifying it. Nothing savoring of fraud or farce may be imputed to either House 34-35

McLean v. *United States,* 226 U. S., 374, 383.

Courts will decline to avoid an act of legislation upon any suggestion as to the motives of legislators or of the unwisdom or impolicy of the act 35-37

Weber v. *Freed,* 239 U. S., 325, 330.
United States v. *U. P. R. R.,* 91 U. S., 72.
United States v. *Goldenberg,* 168 U. S., 95, 102.
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Act of March 27, 1804, Sec. 6 (2 Stat., 300, c. 57).
Act of February 5, 1816, Sec. 3 (3 Stat., 253, c. 10).
Act April 27, 1816, Sec. 6 (3 Stat., 314, c. 107).
Act January 14, 1817, Sec. 1 (3 Stat., 344, c. 3).
Act August 30, 1842, Sec. 8, Par. 5 (5 Stat., 560, c. 260).
Messages and Papers of the Presidents, Vol. IV, pp. 400-401.
Act July 14, 1862, Sec. 15 (12 Stat., 558, c. 163).
Act March 3, 1883, Sec. 11 (22 Stat., 525, c. 121).
Kelly v. *Hedden,* 124 U. S., 196.

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In more recent tariff legislation, Congress, in effecting its purpose of saving treaty rights, has repeatedly expressed a preference for the precise form of language found in the proviso of Subsection 7 43-46

Act March 3, 1891 (26 Stat., 844, c. 534).

Treasury Decision 10824.

Act August 27, 1894, Par. 182½ (28 Stat., 521, c. 349).

Act of July 24, 1897, Par. 209 (30 Stat., 168).

Act August 5, 1909, Sec. 3 (36 Stat., 83, c. 6).

Act October 3, 1913, Sec. IV, Par. B (38 Stat., 192).

VI. The Act is not to be nullified as unwise or impolitic because it may not in its immediate operation discriminate in favor of American shipping to the extent Congress intended should ultimately result 46-57

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But there are nations whose trade is not protected by any treaty, and the treaties of some other nations are not comprehensive of all their trade with us. To such unprotected trade the discount would not apply.............................47-48

The legislation, as its history shows, was deliberately enacted, with a full knowledge of the facts and circumstances to which it applied, and of how it would operate, and with its consequences very distinctly pressed upon the attention of Congress 48-51

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A present advantage to American shipping was intended, which would be great or small as the field of the practical operation of the proviso was small or great; an advantage which might be enlarged from time to time by changes in our treaty agreements 52

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Franklin Sugar Refining Co. v. *United States*, 202 U. S., 580.

Mosle v. *Bidwell*, 130 Fed., 334.

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Franklin Sugar Refining Co. v. *United States*, 202 U. S., 580.

Fabbri v. *Murphy*, 95 U. S., 191, 197.

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Supreme Court of the United States.

Nos. 496 to 509.

OCTOBER TERM, 1915.

THE UNITED STATES, Petitioner, v. THE M. H. PULASKI CO. et al., Respondents.	No. 496.
THE UNITED STATES, Petitioner, v. R. B. HENRY CO. et al., Respondents.	No. 497.
THE UNITED STATES, Petitioner, v. JAMES ELLIOTT & CO. et al., Respondents.	No. 498.
THE UNITED STATES, Petitioner, v. J. WILE SONS & CO., Respondents.	No. 499.
THE UNITED STATES, Petitioner, v. ROBERT MULLER & CO., Respondents.	No. 500.
THE UNITED STATES, Petitioner, v. WOOD & SELICK et al., Respondents.	No. 501.
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THE UNITED STATES, Petitioner, v. PARK & TILFORD, Respondents.	No. 508.
THE UNITED STATES, Petitioner, v. SELGAS & CO., Respondents.	No. 509.

BRIEF FOR THE RESPONDENTS.

Statement of the Cases.

The classification of the cases made by the Government, the claims of the respondents in each of them, the rulings and decisions of the Board of General Appraisers and of the Court of Customs Appeals and the issues presented for determination are correctly set forth in the brief for the Government and need not be repeated by us.

The primary and paramount question, underlying all the cases, is as to the meaning of Subsection 7 of Paragraph J of Section IV of the Tariff Act of 1913.

The Government contends that it has no force or meaning and is an absolute nullity. The respondents contend that it grants by virtue of its first clause a discount of 5 per centum on all duties upon imports made in American vessels and by the proviso extends this discount to imports in the vessels of nations with which we have treaties containing reciprocal commercial agreements.

The Government further contends that even if the respondents are right in this construction of the statute, the discount may yet not be allowed on goods entered without payment of duty and warehoused prior to October 3, 1913, and not withdrawn until after that date. The respondents contend that the discount must be allowed on all goods, coming within the scope of the subsection, the importation of which was not completed prior to the date mentioned.

The facts in each case differ only as to the date of the importation, the character of the merchandise and the registration of the vessel in which the merchandise was imported. It is, therefore, unnecessary to set forth here in detail a statement thereof, but for purposes of reference they are summarized in Appendix A annexed. The references to the record herein are to the transcript of record in causes Nos. 497, 498, 499.

SUMMARY OF POINTS.

I.

The subsection is plain and without ambiguity. By its first clause the discount is granted on goods imported in American vessels, and by the proviso, discrimination against nations with which we have reciprocal commercial agreements is precluded and so the discount is extended to imports in their vessels.

II.

Even if the treaties had not been executed by the statute they would nevertheless be self-executing.

III.

The proviso does not nullify the first clause. To so construe it is to nullify the entire subsection.

IV.

The subsection is an intelligent expression of a legislative purpose to aid American shipping without immediate disturbance of existing treaty agreements.

V.

That the purpose of the law might have been otherwise or better expressed is no reason for denying to it its plain significance.

VI.

The Act is not to be nullified as unwise or impolitic because it may not in its immediate operation discriminate in favor of American shipping to the extent Congress intended should ultimately result.

VII.

Substantial discrimination in favor of American vessels in fact results from respondents' construction.

VIII.

The subsection became effective with the Tariff Act itself.

IX.

Goods arriving in vessels of the United States or in vessels of treaty nations prior to October 4, 1913, warehoused on arrival and withdrawn from bonded warehouse on or after October 4, 1913, are entitled to the discount.

X.

If the 5 per cent. discount be allowed at all it is concededly allowed to Cuban goods.

ARGUMENT.

The primary and paramount question in this case is, what is the meaning of Subsection 7 of Paragraph J of Section IV of the Tariff Act of 1913.

The respondents contend that the subsection means what it says; the Government, that it means nothing at all.

The subsection is as follows, viz.:

> "J. Subsection 7. That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The Tariff Act as an act imposing duties on imports would be in nowise impaired if this subsection were taken out of it bodily. Nor would the subsection be impaired in any wise if it were the subject of a separate enactment. Substitute the word "law" for the words "this Act" in the second line of the subsection and we have a piece of legislation complete and operative within itself. But what does it mean?

I.

The subsection is plain and without ambiguity. By its first clause the discount is granted on goods imported in American vessels, and by the proviso, discrimination against nations with which we have reciprocal commercial agreements is precluded and so the discount is extended to imports in their vessels.

The meaning of the section must be determined if possible from the words in which it is expressed and resort to extrinsic aids is permissible only in case the law is not self-explanatory.

> *Weber* v. *Freed,* 239 U. S., 325, 330.
>
> *Dewey* v. *United States,* 178 U. S., 510, 521.
>
> *Hamilton* v. *Rathbone,* 175 U. S., 414, 419.
>
> *United States* v. *Goldenberg,* 168 U. S., 95, 102, 103.

The law is to be considered in its entirety, the principal clause and the proviso together as one expression of legislative intent.

> *White* v. *United States,* 191 U. S., 545, 551.
>
> *Dollar Savings Bank* v. *United States,* 19 Wall, 227.

The principal clause is a plain statement of a single and simple proposition. "A discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States." This is intelligible and practicable. In determining the duties on imports in American bottoms the schedule rates are to be discounted five per cent. We need not go outside the clause to ascertain its meaning or to find a mode of carrying it into effect. It is self-explanatory and self-executing.

But there is the proviso, "that nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

Here is an implication that there may be existing treaties between the United States and foreign nations, and such is the fact. There is the further implication that one or more of such treaties might be abrogated or in some manner impaired or affected by the principal clause. We must then follow the reference of the act and make inquiry as to our treaties and ascertain which of them, if any, may by any possible construction or operation of the act be abrogated, impaired or affected.

We find a number of such treaties. The Treaty of Commerce and Navigation of 1871 with Italy may for the present purpose be taken as a type of the treaties except the British, French and a few others stated in the Government brief (pp. 4, 6, 7).

In the Italian treaty there is one article, and only one, which would by any possible construction be abrogated, impaired or affected by the act. This is Article V and is as follows:

> "The high contracting parties agree that whatever kind of produce, manufactures, or merchandise of any foreign country can be from time to time lawfully imported into the United States, in their own vessels, may be also imported in Italian vessels; *that no other or higher duties upon the tonnage of the vessel or her cargo shall be levied and collected,*

> *whether the importation be made in vessels of the one country or of the other;* and, in like manner, that whatsoever kind of produce, manufactures, or merchandise of any foreign country can be from time to time lawfully imported into Italy in its own vessels, may be also imported in vessels of the United States, and that no higher or other duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other."

How can this article of the treaty be abrogated, impaired or affected by the act? The Constitution, Article VI, provides:

> "This Constitution and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

In virtue of this provision the treaty-making power of the United States is a law-making power, as much so as the Congress. Each must keep within the bounds of its authority, and doing so the acts of each are of equal rank and dignity. As this Court said in *Whitney* v. *Robertson,* 124 U. S., 190, 194:

> "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other."

See, also, *United States* v. *Lee Yen Tai,* 185 U. S., 213.

In determining what is the law in any given case, where as here, a treaty and an act of Congress are involved, "the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing" (*Whitney* v. *Robertson*, *supra*).

Although the Government contended below that this treaty was self-executing (*infra*, p. 14), it now says that it was merely an executory promise. To avoid digression here we will postpone the discussion of the self-executing or executory character of the treaties to a later stage of the argument (*infra*, II, p. 14).

But even if the treaty were executory, which we do not concede, the fact remains that it was executed by this Government by the very statute in question. That asserted the obligation of the Government to admit imports in Italian vessels without payment of other or higher duties upon the cargoes than were levied and collected upon importations made in vessels of the United States.

We have, then, a treaty stipulation with Italy that no other or higher duties shall be levied or collected upon imports in Italian vessels than upon imports in vessels of the United States, and we have an act of Congress, later in date, prescribing a schedule of duties upon imports generally, with a discount, however, of five per centum on all duties upon imports in American vessels. This discount is not in terms extended to Italian vessels, and the law being construed, and as a later law it well might be, as limiting the discount to the cargoes of American vessels, the treaty stipulation would be affected, impaired and indeed abrogated, for the duties thenceforth imposed upon the cargoes of Italian vessels would be other and higher than those imposed upon the cargoes of American vessels. And so to prevent this effect and operation of the act, the proviso was added that "nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation." The act was not to be construed as a later act repugnant to the treaty stipulation, but both were to stand as if the treaty were a part of the act or of a later date. Congress had power to abrogate the treaty by the act in question, (*United States* v. *Lee Yen Tai, supra*), but declined to do so, and in terms said that the treaty stipulation and the act should stand together. The treaty stipulation was by Congress in effect made a part of the act of equal efficacy with the provision for discount.

The resulting law of the case is that the schedule of duties prescribed by the tariff act is to be discounted five per cent. on imports in American bottoms and no other or higher duties are to be levied upon imports in the vessels of Italy than in those of the United States.

There is no question here, it is to be observed, of conflict between the legislative power and the treaty-making power of the United States, *for the agreement made by the treaty-making power has the express sanction of the legislative power.*

By express sanction of the legislative power the treaty-making power agrees that the duties upon imports in Italian vessels shall be the same as upon imports in American vessels. And whatever the nationality of the vessel, Italian or American, the duties to be levied and collected are those prescribed for imports in American vessels by the act imposing the duties, for the treaty itself prescribes no duties.

Keeping within the terms of the act and of the treaty stipulation to which we are referred by the act, no other conclusion is possible. The meaning of the entire subsection becomes as evident as that of the principal clause: a discount of five per cent. to American vessels, says the principal clause; and the same to the vessels of Italy, says the proviso. And there is no difficulty in putting the law into actual operation. Collect the same duties upon imports in the vessels of both nations, viz.: the duties prescribed by the schedules, less five per cent.

If we had such a treaty only with Italy, there would be no possible basis for different constructions of the act and no controversy concerning it would ever have arisen. The effect of the act would be the same in such case as if the proviso read, "that nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and Italy." The discount would be plainly intended as to importations in vessels of both nations.

How can the fact that we have treaties containing the same reciprocal commercial provision with other nations as well as with Italy affect the construction of the act? The proviso applies to "*any treaty* concluded between the United States and *any foreign nation.*" The number of such treaty nations would not alter the terms of the act and so could not alter its construction. True it is, that if we had such a treaty with every nation, the result of the operation of the law would be no discrimination in favor of American shipping and we may well presume that Congress in that case would not enact such a law as this, unless it also contemplated an early change in our treaty relations.

But the fact is admittedly that the reciprocal commercial provisions of our treaties with foreign nations are far from being comprehensive of all our foreign commerce, and Congress has seen proper, in the circumstances as they are, to enact this law, and its construction and legal effect are to be determined by the words employed, and are necessarily the same whether the terms "any treaty concluded between the United States and any foreign nation," are comprehensive of only one treaty or of more.

If a duty is imposed by the act, then as to imports in American vessels the discount shall be allowed, and the "shall" here is equivalent to "must." The subsection by its terms admits of no postponement beyond the taking effect of the Tariff Act.

It became effective on the day following the passage of the act, because (a) Paragraph U of Section IV so expressly provides, and (b) the clause itself refers to "all duties imposed by this Act" which, by the opening sentence of the first section of the act are imposed "on and after the day following the passage of this Act, except as otherwise specially provided for in this Act." There are four provisions in the act which specially provide that they shall take effect at some other time (Pars. 177, 310, 650 and 651 of Section 1), but the subsection here in question is not one of them.

In all the cases now before the Court, the duties were "imposed by this Act" of October 3, 1913. Therefore, the subsection referred to applies to them.

II.

Even if the treaties had not been executed by the statute they would nevertheless be self-executing.

It is immaterial whether or not the shipping clauses of the various treaties here concerned operate *ex proprio vigore,* since the very statute under consideration expressly saves the treaties from repeal and gives them the force and effect of laws.

That the stipulations of all the treaties involved are self-executing and in force, was not only not disputed by the Government in the Court of Customs Appeals, but was distinctly contended for. Indeed as the Court below expressly points out:

> "At the outset the Government unqualifiedly concedes that the said reciprocal commercial provisions are effective and in force as the law of the land * * *" (R., p. 47).

This was done in support of its position that Subsection 7 was entirely inoperative. It was said by the Assistant Attorney General (p. 31 of the Brief in that Court):

> "If the departments of our Government which are entrusted with the foreign intercourse of the nation have recognized the existence and validity of these treaties, and if Congress has acted and has forbidden any construction of Subsection 7 which would abrogate, impair or affect them, it would be an anomaly to have an opposite construction maintained in the Courts. It would be monstrous for a Court to assert that the treaties were so inoperative that no attention need be paid to their requirements."

The Government now takes a position in its brief before this Court which is repugnant to its former unqualified concession alluded to by the Court below. It begins by saying that a definition of the treaties is in this instance "after all immaterial" (Brief, 36). It then proceeds to argue that "the treaties under discussion are in fact not self-executing but merely executory promises binding upon the legislative branch of the Government" (Brief, 37). We quite agree that a discussion of this branch of the case is "at the cost of digression" (Brief, 36), but the Government's change of attitude would seem to require it.

The leading example cited to support the contention that "action and inaction alike rest with the *legislative branch*" (Brief, 39), is, when analyzed, unconvincing. The British treaty of 1815 was concluded July 3d. At that time there was not only, as the Government points out (Brief, 39), "a statute imposing an additional duty of ten per cent. on all importations in foreign vessels," but in addition to this, Congress, beginning in 1809, had passed a series of non-intercourse acts in retaliation for British edicts which were held to violate the neutral commerce of the United States.

No such parallel exists in the case at bar by reason of treaties and laws now in force. As the Solicitor General points out, there is no such discrimination in force against merchandise imported in foreign bottoms. (Brief, pp. 69 *et seq.*, 109.) The reason for the retention of Subsection 1 of Paragraph J of the existing law referred to by him is to prevent discrimination by foreign nations against our shipping, and it has been very effective.

In the face, then, of the drastic laws in force when the British Treaty of 1815 was proclaimed, the question was raised in Congress as to whether their legislative repeal was essential. The learned Solicitor General says, "Congress perceived that the maintenance of this discrimination was inconsistent with the treaty and that the treaty did not work of itself a repeal of the statute." (Brief, 39). Let us see:

When Congress assembled in December, 1815, the House passed a bill following closely the language of the treaty (14th Annals of Congress, 1st Session, p. 674). The Senate in the meantime passed a bill based upon quite a different theory of the necessities of the situation. The controversy was thus outlined on the floor of the Senate by Senator James Barbour, Chairman of the Committee on Foreign Relations and afterwards Secretary of War and Minister to England (*Ibid.*, p. 46).

> "A bill, brought in by the Committee on Foreign Relations, passed the Senate unanimously, declaring that all laws in opposition to the convention between the United States and Great Britain, concluded on the 3d July last, should be held as null and void. The principle on which this body acted, was, that the treaty, upon the exchange of its ratification, did, of itself, repeal any commercial regulation, incompatible with its provisions, existing in our municipal code; it being by us believed at the time that such a bill was not necessary, but by a *declaratory act* it was supposed all doubts and difficulties, should any exist, might be removed. This bill is sent to the House of Representatives, who, without acting thereon, send us the one under consideration, but differing materially from ours. * * *
>
> "Is the legislative sanction necessary to

give it effect? I answer in the negative. Why? Because, by the second clause of the sixth article of the Constitution, it is declared that all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land. If this clause means anything, it is conclusive of the question.

* * * * * *

"The President shall have power, by and with the advice and consent of the Senate, to make treaties, which treaties shall be the supreme law of the land. I seek to gain no surreptitious advantage from the word supreme, because I frankly admit that it is used in the Constitution, in relation to the laws and constitutions of the States; but I appeal to it merely to ascertain the high authority intended to be imparted by the framers of the Constitution to a ratified treaty. It is classed in point of dignity with the laws of the United States. We ask for no superiority, but equality; and as the last law made annuls a former one, where they conflict, so we contend that a subsequent treaty, as in the present case, revokes a former law in opposition thereto." (*Ibid.*, pp. 49-50.)

On February 27, 1816, Mr. King from the Committee on Foreign Relations submitted a conference report pointing out that the conferees of the House made this objection, among others, to the bill passed by the Senate:

> "That by the addition of the word 'declared' to the usual formula, instead of a bill of positive enactment, it assumes the form of a declaratory law."

In answer to this objection the report goes on to say:

> "The conferees of the Senate do not contest, but admitted the doctrine that of treaties

made in pursuance of the Constitution some may not and that others may call for legislative provisions to secure their execution, which provision Congress, in all such cases, is bound to make. But they did contend that the convention under consideration requires no such legislative provisions, because it does no more than suspend the alien disability of British subjects in commercial affairs in return for the like suspension in favor of American citizens; that such matter of alien disability falls within the peculiar province of the treaty power to adjust; that it can not be securely adjusted in any other way, and that a treaty duly made and adjusting the same is conclusive, and by its own authority suspends or removes antecedent laws that are contrary to its provisions.

"*That even a declaratory law to this effect is matter of mere expediency, adding nothing to the efficacy of the treaty,* and serving only to remove doubts wherever they exist.

"The conferees of the Senate thereupon insisted on retaining the word 'declared' in addition to the usual formula of enactment, because it imparts to the bill passed by the Senate the character of a declaratory law, *a quality without which any law would, in this case, be inadmissible.*

"A law that declares to be of no force or effect so much of the laws as are contrary to the provisions of the convention *recognizes the existence and authority* of that convention; the date and limitations of which must ascertain the commencement and duration of the law, while its stipulations place the people of the two nations on a footing of commercial equality by the abolition of discriminating duties on both sides" (Reports of Committee on Foreign Relations, 1789 to 1901, Vol. 8, p. 25). [Italics ours.]

Accordingly the preamble of the Act of March

1, 1816 (3 Stat., 255, c. 22) contains this significant language:

> "Be it enacted and *declared* by the Senate and House of Representatives of the United States of America, in Congress assembled," etc. [Italics ours.]

It appears from this review that the Act of March 1st, 1816, in the face of the precisely formulated House objection, was after all a declaratory law adopted as a "matter of mere expediency, adding nothing to the efficacy of the treaty." The citations from Crandall and Butler (Government Brief, p. 41), are in no way inconsistent with this view.

In 1898 the executive branch of our Government, although there was no executing act of Congress, held the favored nation articles of the Swiss Treaty of 1850 to be self-executing for the purpose of securing to Swiss cordials the same lower rates guaranteed to French cordials by reciprocal agreement, it being held that the absence of certain language of interpretation in the Swiss treaty was intentional and carved out an exception to our usual rule (*Bartram* v. *Robertson*, 122 U. S., 116) that concessions based on valuable consideration do not constitute an invasion of the favored nation principle (see Treasury Decision 20386, and Foreign Relations of the United States, 1899, p. 740 *et seq.*).

We shall see that long prior to 1898 the treaties saved by a proviso in the Tariff Act of 1842 (5 Stat., 560), were recognized by President Polk and the Treasury Department to be self-executing (*infra*, pp. 39, 40).

The view that treaty provisions are in character purely promissory and are executory contracts whose fulfillment is addressed solely to Congress has been repeatedly disavowed by this Court. In the very case relied upon by the Government (Brief, 38), this Court pointed out that while a treaty is in itself a contract between two nations, *"In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land."*

It is true that in *Foster & Elam* v. *Neilson*, 2 Pet., 253, the phrase in the 8th Article of the Treaty with Spain in 1819, "All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, etc., *shall be ratified and confirmed,"* was held to be executory, but it is also true that a contrary conclusion was reached in the subsequent case of *United States* v. *Percheman*, 7 Pet., 51, 89, where, Chief Justice Marshall again writing the opinion, it was held that this same article of the same treaty was not executory but operated *ex proprio vigore:*

> *"Although the words 'shall be ratified and confirmed', are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they 'shall be ratified and confirmed' by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable.*
>
> "In the case of *Foster* v. *Elam* [*Neilson*], 2 Pet., 253, this court considered these words as importing contract. The Spanish part of the treaty was not then brought to our view, and we then supposed that there was no variance between them. We did not suppose that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. *Had this circum-*

> *stance been known, we believe it would have produced the construction which we now give to the article."* [Italics ours.]

So the words "shall be ratified and confirmed" in this later case were held to be self-executing and to operate, in the language of the Court, "by force of the instrument itself."

In *United States* v. *Schooner Peggy,* 1 Cranch., 103, Article 4 of the Treaty with France, 1800, was held to be self-executing. In *Ware, Administrator of Jones* v. *Hylton et al.,* 3 Dallas, 199, Article 4 of the British Treaty of 1783 was held to operate *ex proprio vigore.* See also *Hauenstein* v. *Lynham,* 100 U. S., 483, construing the 5th Article of the Swiss Treaty of 1850; *United States* v. *43 Gallons of Whiskey,* 93 U. S., 188, construing an Indian Treaty of 1863; *Tucker* v. *Alexandroff,* 183 U. S., 424, 429, construing Articles 8 and 9 of the Russian Treaty of 1832.

As to *Oldfield* v. *Marriott,* 10 How., 146, we think the position of the learned Solicitor General (Brief, p. 43) is sufficiently demonstrated to be unsound by the following language of the opinion of the Court of Customs Appeals (Rec., p. 84):

> "In this opinion it is true that the court did not allude to the question of whether any of the treaties were or were not self-executing, but it is entirely clear that they were assumed to be so, and, considering the length and exhaustiveness of the opinion, we cannot for a moment believe that the court overlooked this question. It must be regarded not only as an approval of the authority of the treaty-making power to negotiate the treaties here under consideration but *also as an authority that such treaties and the stipulations thereof before us are self-executing."* [Italics ours.]

In *Geofroy* v. *Riggs*, 133 U. S., 258, 267, it was held that the treaty power as expressed in the Constitution was unlimited except by the restraints found in that instrument itself. The Court said:

> "*It would not be contended that it extends so far as to authorize what the Constitution forbids,* or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co.* v. *Lowe,* 114 U. S., 525, 541. *But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.*" [Italics ours.]

Rainey v. *United States,* 232 U. S., 310, 316, cited by the Government (Brief, p. 43), only reiterates the familiar principle that when a treaty is inconsistent with a subsequent act of Congress the latter will prevail, this Court citing with approval the language of the Court below:

> "Treaties are contracts between nations and *by the Constitution are made the law of the land.* But the Constitution does not declare that the *law so established* shall never be altered or repealed by Congress. Good faith toward the other contracting nation might require Congress to refrain from making any change, but if it does act, its enactment becomes the controlling law in this country. The other nation may have ground for complaint, but every person is bound to obey the law. And as a corollary it follows that no person acquires any vested right to the continued operation of a treaty." [Italics ours.]

The implication that treaties *until* altered or repealed are the law of the land is unmistakable. *Taylor* v. *Morton,* 2 Curtis, 454, is authority only for the proposition that a subsequent law repeals an antecedent treaty, as the opinion below demonstrates (Rec., p. 80), and it is in this connection that this case is cited with approval by this Court in *Rainey* v. *United States, supra.*

It is clear from the foregoing that the treaties in question are self-executing. Each of them is a part of the municipal law of the land, in that they severally confer rights upon individuals which, in accordance with the established doctrine of this Court, may be judicially enforced. Duties are paid by private citizens or subjects and the clauses in question operate directly upon their rights. They are therefore directly in the line of municipal law fixing individual rights.

Head Money Cases, 112 U. S., 580, 598.
De Lima v. *Bidwell,* 182 U. S., 1, 195.

III.

The proviso does not nullify the first clause. To so construe it is to nullify the entire subsection.

The Government refuses to accept the subsection as meaning what it says and insists that it is an absolute nullity. That Congress had power to deal with the subject matter, that it had power to do exactly what we say was done—that is, grant the discount to imports in vessels of the United States and of nations with which the United States had reciprocal commercial treaty agreements, is not denied.

The contention is that Congress has so done it as not to do it. "The proviso" (Brief, pp. 46, 47), "was not intended to enlarge the operation of the discount clause, but on the contrary to restrict it * * *. This purports to be merely a rule of construction, and the courts are directed by it to lay the main clause of the subsection alongside the treaties and give to the main clause no interpretation which is in conflict with the promises of the latter." The conclusion is reached that the discount clause shall operate if it does not contravene any treaty and shall not operate if it does. This makes of the proviso a condition as to the taking effect of the main clause.

Such was clearly the nature of the proviso in *Austin* v. *United States*, 155 U. S., 417. The legal representatives of Austin were by the act there in question authorized to sue upon certain demands in the Court of Claims, provided it be shown that neither he nor any of his surviving representatives were disloyal during the war. Here was a fact to be determined which was appropriately referred, with the demands themselves, to the Court of Claims for adjudication.

We have no such case here. That there were treaties which might be abrogated or impaired by the main clause standing alone was known to both houses of Congress and because of this the proviso was enacted. The main clause was adhered to, but it was provided that it should be so construed as not to impair the treaties. The effect of one law upon another, and especially in case of repugnance between the two, is a matter of statutory construction and is always dealt with under that head; and one fixed rule of construction is that in case of repugnance between two statutes, the later will be held to have repealed or abrogated the earlier law. Apply this rule of construction, that is, so construe the subsection as to make it a later law repugnant to the treaties, and the treaties would be abrogated. To prevent this effect the proviso was enacted. The subsection is not to be so construed as to abrogate the treaties, but the treaties and the subsection are to stand together unaffected by any rule of construction. This gives effect to the subsection as a whole. The Government's contention destroys it in its entirety. In the case of *Brushaber* v. *U. P. R. R. Co.*, decided January 24th, 1916, this Court rejected a proposed construction of the Constitution because, "it clearly results that the proposition and the contentions under it, if acceded to, would cause one provision of the Constitution to destroy another."

An act of Congress will not be construed as giving a right and taking it away at one and the same instant.

McLean v. *United States*, 226 U. S., 374.

Cases are cited as to the functions a proviso may perform. In truth these are various, and in each case to be determined by what is there intended.

In *Georgia R. & B. Co.* v. *Smith*, 128 U. S., 174, 181, the Court said:

> "The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term

> 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

In *Interstate Commerce Commission* v. *Baird*, 194 U. S., 25, 36, Mr. Justice Day, speaking for the Court, said:

> "It is true that the office of a proviso, strictly considered, is to make exception from the enacting clause, to restrain generality and to prevent misinterpretation (citing cases). It is apparent that this proviso was not inserted in any restrictive sense or to make clear that which might be doubtful from the general language used. It was inserted for the purpose of enlarging the operation of the statute so as to include a class of cases not otherwise within the operation of the section. It may be admitted that this use of a proviso is not in accord with the technical meaning of the term or the office of such part of a statute when properly used. But it is nevertheless a frequent use of the proviso in Federal legislation to introduce, as in the present case, new matter extending rather than limiting or explaining that which has gone before."

A rational interpretation will be given to a statute and a proviso, and not one by which the statute will, through the proviso, destroy itself.

> *Adams Express Co.* v. *Croninger*, 226 U. S., 491.
> *United States* v. *Mille Lac Chippewas*, 229 U. S., 498.

In the present case the proviso was not a condition upon which the law was to take effect. The conditions were all known and needed not to be ascertained by any tribunal. And it was in recognition of the conditions and to prevent the abrogation abruptly and rudely of the treaty agreements that the proviso was introduced extending the discount to treaty nation vessels. This left the door open to the abrogation of the treaties or of any of them in due, orderly and courteous course of international procedure. The construction contended for by the Government does not fulfil any of the recognized functions of a proviso; it is not one of restriction, limitation, explanation, interpretation, qualification, enlargement or condition, but simply one of annihilation. The proviso kills the main clause and dies with its victim.

IV.

The subsection is an intelligent expression of a legislative purpose to aid American shipping without immediate disturbance of existing treaty agreements.

The provision as it stands and considered with reference to its own terms, has a meaning and bears a sensible construction. It is not a meaningless or contradictory jumble of words, as might be inferred is the view of the Government from some of the cases it cites (Brief, p. 79). In *United States* v. *Cantril,* 4 Cranch., 167, the statute, *by its terms,* defined as a forgery or counterfeit, a "bill or note issued by order of the president, directors and company of the Bank of the United States, and signed by the president, and countersigned by the cashier thereof." Such a note or bill was genuine and could not be counterfeit. What is quoted (Brief, p. 79) from *City of Mobile* v. *Eslava,* 16

Peters, 234, 247, is put simply by way of illustration. Manifestly an act vesting title to the same property in hostile claimants would be a nullity, by its own terms. But, says Justice McLean, "Exceptionable and involved as the language of this statute may be, it is not obnoxious to this objection," and he further observed that "however obscure some points of the act may be, its provisions are consistent." So he construed the Act to uphold it. *In re Hendricks*, 60 Kansas, 796, is clearly distinguishable. A county court was created by the act and a judge of the court was to be appointed by the governor. The act by its terms was to be effective from its date and also not effective until approved by the voters at the next general election. The judge was to be appointed within twenty days from the date of the act and again was not to be appointed until after the approval of the act by the voters. In *Farmers' Bank* v. *Hale,* 59 N. Y., 53, the act declared its true purpose to be to put state banks upon an equality, in the matter of usury, with national banks, and yet prescribed an entirely different penalty for taking usurious interest. In *International Harvester Company* v. *Kentucky,* 234 U. S., 216, the uncertainty which avoided the act inhered in its terms, which were nothing more or less, Justice Holmes said, "than an illusory form of words."

The actual contention of the Government is better illustrated by its reference to the case of *Texas & Pacific Railway* v. *Interstate Commerce Commission,* 162 U. S., 197, 254. It quotes Mr. Justice Harlan as saying with reference to a certain construction of the Interstate Commerce Act that if the Act had been plainly expressed to that effect:

> "No one would expect such a bill to pass an American Congress. If not, we should declare that Congress ever intended to produce such a result; especially, when the act it has passed does not absolutely require it to be so interpreted."

There is an obvious mistake in the report of this opinion, which the Solicitor General suggests should be corrected by substituting "never" for "ever"; we think the correction should be made by inserting the word "not" between "should" and "declare," as is done in 16 Supreme Court Reporter, 666, 688."

However this may be, the quotation is from a dissenting opinion, and in criticism of the majority opinion, and had reference to the very construction which the majority placed on the act, the construction which Mr. Justice Harlan contended made the act a very impolitic and unwise one. The case is then not an authority for the proposition that a statute is to be held to be no statute at all on the mere assumption that "no one would expect such a bill to pass an American Congress."

The suggestion that the statute is absurd is but a phase of the contention that it is impolitic and unwise. It is certainly plain and intelligible English and is not self-contradictory, nor even contradictory of what is said to be its purpose. The suggested absurdity of the statute is not in what it does, but in what it failed to do. Congress desired to do something for American shipping, but could not do as much as it desired, and so we are to infer it did nothing, although it plainly intended and attempted to do something. Is not the absurdity, using the word in its legal sense, in the argument, rather than in the statute?

Dealing with such a question in *Pirie* v. *Chicago Title and Trust Co.,* 182 U. S., 438, 451, the Court said:

> "What is the test of absurdity? The contradiction of reason, it may be said, and to make an immediate application to legislation, the contradiction of the reason which grows out of the subject matter of the legislation and the purpose of the legislators. But all legislation is not simple nor its consequences obvious or to be controlled, even if obvious. Whether there should be any legislation at all and its extent and form may be matters of dispute. Its consequences may be viewed with favor or with alarm; some regretted but accepted as inevitable—accepted as the shadow side of the good. In such situation it is for the legislature to determine, and it is very certain that the judiciary should not refuse to execute that determination from its view of some consequence which (to use the thought and nearly the words of Chief Justice Marshall) may have been contemplated and appreciated when the act was passed, and considered as overbalanced by the particular advantages the act was calculated to produce. *United States* v. *Fisher,* 2 Cranch., 358, 389. Therefore the sound rule expressed in *Sturgis* v. *Crowninshield,* 4 Wheat., 202: 'It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other * * * and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But, if in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disre-

> garded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.' "

There is in the statute under consideration no such contradiction or absurdity. It does not in its operation contradict "the reason which grows out of the subject matter of the legislation and the purpose of the legislators." The statute is responsive to that reason and in aid of that purpose. Discrimination in favor of American shipping is the reason of the legislation and the purpose of the legislators. A discount upon duties is the method employed. Not everything can be immediately accomplished without an instant and rude abrogation of treaties, but treaties may be abrogated in proper manner and time, and until then their provisions are to be observed. And if it be granted—what is for legislative and not for judicial determination—that discrimination in favor of American shipping is a wise policy, this statute is not an absurd measure for the inauguration of such a policy.

The Solicitor General (Brief, p. 33), introducing his argument that the addition of the proviso resulted in an *impasse,* quotes from the language of Mr. Justice Holmes, in *U. S.* v. *Plowman,* 216 U. S., 372, 375, as follows:

> "* * * It is not unknown, when opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective."

But the *Plowman* case is an authority directly contrary to the Government's contention, as appears by the quotation of the words immediately preceding and following those quoted by the Solicitor General. In that case the Court was dismissing a suggestion that a qualification inserted into a certain act made it, or was intended to make it, ineffective, which is shown by the following language of Mr. Justice Holmes:

> "*It is said that such a construction empties the statute of all its use, because if the land is known to be valuable for minerals a mining claim to it will be located, only the owners of which can cut the timber, whereas the statute gives the right to all residents. If that were true, courts still would be bound by the explicit and unmistakable words.* It is not unknown, where opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective. *But the objection is stated too strongly.* As pointed out at the argument, in 1878 probably there was a great deal of mineral land still unexplored on which claims had not been located, not to speak of mere exceptional cases in which the act would apply." (Italics ours.)

This answers the entire argument in the present case. The Government's argument is that the statute by the proviso was emptied of all its use, that the proviso was a qualification inserted into the act that was "hoped to make it ineffective." But to empty it of its use is not to empty it of its meaning, and to make it ineffective of its assumed purpose is not to make it void. We still are "bound by the explicit and unmistakable words."

We may concede without cavil that the policy of the law was discrimination in favor of American shipping, and further that this policy would be best promoted by making the field of discrimination as wide as possible—against the world if you please—and that as the field is restricted the resulting benefit of discrimination is diminished. But all this goes to the usefulness of the Act and not to its meaning or validity.

The Government's interpretation of the law is not interpretation at all, but is frankly nullification, and that because of the assumed unwisdom of the Act.

In his brief supporting the petition for certiorari, the Solicitor General says (p. 12):

> "Congress in what seem unmistakable terms, and for a definite purpose, confined the discount to American bottoms. It cannot be supposed that it intended at the next moment to destroy the entire economic and maritime effect of this discrimination by granting a like privilege to practically all the great trading nations of the world."

And yet in his present brief he quotes from Mr. Payne's speech on the conference report to show that precisely this was done (Brief, p. 32):

> "They had a provision in the bill of a discount of 5 per cent. duty on goods brought in in American ships. Well, I told the House I thought that might be a good provision, but that would not work, because it abrogated all the treaties. That went in, it went over to the Senate, and they considered it and then struck it out. The conferees have agreed to it with a proviso that absolutely destroys the force of it. They provided that it shall not abrogate or impair any treaty. Now you see it and now you do not see it."

Mr. Payne was speaking not as a lawyer, but as a law maker. The proviso in his opinion emptied the main clause of its use. Like the Solicitor General, Mr. Payne overstated the effect of the proviso. The proviso diminished the use of the main clause, but did not exhaust it. As a whole the subsection declared a new policy, one of discrimination, as against one of reciprocity, the new policy not being given full scope at once because it would be discourteous, to say the least, to abrogate our treaties without notice to the other nations interested. The declared policy, if persisted in, involved the abrogation of the reciprocal commercial agreements at some time and to some extent, but it need not be at once nor to the full extent. The inconsistency, "the now you see it and now you do not see it," arises on the assumption only that the treaties were none of them ever to be changed, and that there was nothing for the subsection to operate on. Considered as a beginning, the subsection is not a vain or a foolish thing. It stands there to become by force of its own terms more and more effective as changes in treaty agreements are made, which may be either by the treaty-making power or by act of Congress.

Of the argument of the Government in this case, it may be said, as the Court said of the argument for plaintiff-in-error in *Unity* v. *Burrage,* 103 U. S., 447, 456, "This seems to be an attempt to overturn by argument and inference a deliberate enactment of the legislature, and erase it bodily from the statute book," while it is the duty of the Court "if possible, to give it effect, *ut res magis valeat quam pereat.*"

It is not permitted under any rule of statutory construction to say that the proviso was a stroke of legislative *finesse,* designed by the Senate to nullify the section as formulated by the House, under pretense of merely qualifying it. And no more will it be permitted to say that the House under pretense of qualifying its favor to American shipping, intended to withdraw it altogether. Nothing savoring of fraud or farce may be imputed to either House. Nor can we say that here is a mere confusion of words, tumbled together, formless and void, by some blunder or accident of the composing room, for the words are marshalled in sensible order and express a purpose easily understood and as easily made effective, whether the purpose be approved or disapproved. As this Court said in *McLean* v. *United States,* 226 U. S., 374, 383,

> "To decide otherwise is to say that Congress gave a right and took it away at one and the same instant, or, in some confusion of mind, intended to withhold it by using the aptest word to confer it."

The argument against the law is not that it is unintelligible, but that it is unwise; not that it is impracticable, but that it is impolitic. To give effect to such an argument in the courts is not an exercise of the power of interpretation, but of the power of veto. This Court has always declined to avoid an act of legislation upon any suggestion as to the motives of legislators or of the unwisdom or impolicy of the act. Answering the argument assailing an act of Congress in the recent case of *Weber* v. *Freed,* 239 U. S., 325, 330, the Court said, that it "plainly is wanting in merit, since it rests upon the erroneous assumption that the motive of Congress in exerting its plenary power may be taken into view for the purpose of refusing to give effect to such power when exercised." And it infringes just as much upon the plenary power of Congress to determine the validity of its enactments with reference to assumptions as to their wisdom or policy. "Whether an Act of Congress be more or less politic or wise," said the Court in *United States* v.

U. P. R. R. Co., 91 U. S., 72, "it is not our province to determine."

In *United States* v. *Goldenberg*, 168 U. S., 95, 102, the Court said:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

To conclude that this subsection has no force whatever, that the law is the same whether it is in or out, is to deny to Congress either an honest purpose in making the enactment, or a knowledge of the meaning of words and of the rules of grammar.

In *Dewey* v. *United States*, 178 U. S., 510, 521, the Court said:

> "This court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress. What is termed the policy of the Government in reference to any particular subject of legislation, this court has said, 'is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the in-

> terpretation of statutes.' *Hadden* v. *The Collector,* 5 Wall., 107, 111. Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such."

V.

That the purpose of the law might have been otherwise or better expressed is no reason for denying to it its plain significance.

The Solicitor General employs his facile pen (Brief, p. 55), to draft the subsection in the form *he* would use to express the only meaning it can have. We concede the superiority of his composition. But what does it prove? Nothing to the present purpose. A statute is not to be nullified because an able lawyer and accomplished scholar can express it in better English. It remains true that the only meaning of which the subsection is capable is that so clearly expressed in the two drafts submitted by the Solicitor General. His own argument proves this. It is that or nothing.

Nor is it significant that in other statutes, in which there are provisos against the impairment of treaties, somewhat different language is used. No two persons, left to themselves, would express the same meaning in the same way. The Solicitor General himself gives an example of the same meaning expressed in two ways by one person.

But the terms of this proviso are not new to our legislation. The phraseology resorted to by Congress in its evident purpose from time to time to save treaty rights has not been uniform, but the intent to save them has been always manifest. Beginning with the Tariff Act of March 27, 1804, the following forms of expression have been employed by Congress to effectuate its purpose.

The Act of March 27, 1804, providing for a discriminatory duty of 10 per cent. on goods imported in ships or vessels not of the United States, contained the following proviso:

> "Provided however, that nothing in this act shall be so construed as to contravene any provision of the treaty or conventions concluded between the United States of America and the French Republic, on the thirtieth day of April, one thousand eight hundred and three." (2 Stat., 299, 300, Chap. lvii, Sec. 6.)

The action of Congress betrays at this early period a nice concern for our treaty obligations and a clear intent that, notwithstanding the provision in the Act of 1804, French and Spanish vessels laden with the cargoes of the kind mentioned in the treaty should continue to enjoy the benefits guaranteed by it—just as we here allege, that by enacting Subsection 7 Congress in its proviso secured to treaty nations their treaty benefits.

The form of words employed in adherence to this policy has not always been the same—indeed it has varied a good deal, but frequently we find language similar to that with which we are here concerned. Thus, in Section 3 of the Act of February 5, 1816 (which secured the continuance of discriminating duties), occurs:

> "And be it further enacted, That nothing in this act contained shall be so construed as to

> contravene any provision of any commercial treaty, or convention, concluded between the United States and any foreign power or state; nor so as to impair, or in any wise affect the provisions of the act," [of March 3, 1815, repealing discriminating duties in certain cases]. (3 Stat., 253, Chap. x, Sec. 3.)

Section 6, Act of April 27, 1816, continuing certain bounties, advances and drawbacks, contained the following proviso:

> "*Provided always,* That this provision shall not be deemed in anywise to impair any rights and privileges, which have been, or may be acquired by any foreign nation, under the laws and treaties of the United States, relative to the duty of tonnage on vessels." (3 Stat., 314, Chap. cvii, Sec. 6.)

In the Act of January 14, 1817, in relation to tonnage duties, we find this proviso:

> "Provided always, That nothing in this act contained shall be deemed in any wise to impair any rights and privileges which have been or may be acquired by any foreign nation under the laws and treaties of the United States relative to the duty on tonnage of vessels." (3 Stat., 344, Chap. iii, Sec. 1.)

The Tariff Act of August 30, 1842, Section 8, Paragraph 5, refers to brandy, wines, etc., with the proviso:

> "*Provided,* That nothing herein contained shall be construed or permitted to operate so as to interfere with subsisting treaties with foreign nations." (5 Stat., 560, Chap. cclxx, Sec. 8.)

Without further legislation, or even the suggestion that further legislation was necessary, this language was given effect, as shown by President Polk's first message December 2, 1845:

> "Under the eighth section of the Tariff Act of the 30th of August, 1842, a duty of 15 cents per gallon was imposed on port wine in casks, while on the red wines of several other countries, when imported in casks, a duty of only 6 cents per gallon was imposed. This discrimination, so far as regarded the port wine of Portugal, was deemed a violation of our treaty with that power, which provides that—
>
> > 'No higher or other duties shall be imposed on the importation into the United States of America of any article the growth, produce, or manufacture of the Kingdom and possessions of Portugal than such as are or shall be payable on the like article being the growth, produce, or manufacture of any other foreign country.'
>
> "Accordingly, to give effect to the treaty as well as to the intention of Congress, *expressed in a proviso* (italics ours) to the Tariff Act itself, that nothing therein contained should be so construed as to interfere with subsisting treaties with foreign nations, a Treasury circular was issued on the 16th of July, 1844, which, among other things, declared the duty on the port wine of Portugal, in casks, under the existing laws and treaty to be 6 cents per gallon, and directed that the excess of duties which had been collected on such wine should be refunded" (Messages and Papers of the Presidents, Vol. IV, pp. 400-1).

Here we have a definite recognition by the department of the Government charged with the administration of the laws that rights in an antecedent treaty expressly saved from destruction *by a proviso* of a subsequent tariff act must be given full force and effect without further action by the legislative branch of the Government.

That the Solicitor General is driven by his contention into a position frankly at war with this precedent, established over seventy years ago, is shown by a reference to page 81 of his brief. He there *assumes* that a precisely analogous case, based on the Russian Treaty of 1832, and the Tariff Act of 1861 would have produced "a legislative equipoise" or a nullity.

In Section 15 of the Act of July 14, 1862, laying certain additional tonnage taxes, the following proviso appears:

> "That nothing in this act contained shall be deemed in anywise to impair any rights and privileges which have been or may be acquired by any foreign nation under the laws and treaties of the United States relative to the duty on tonnage of vessels." (12 Stat., 558, Chap. clxiii, Sec. 15.)

The Act of March 3, 1883, Section 11, provides:

> "Nothing in this act shall in any way change or impair the force or effect of any treaty between the United States and any other government, or any laws passed in pursuance of or for the execution of any such treaty, so long as such treaty shall remain in force in respect of the subjects embraced in this act; but whenever any such treaty, so far as the same respects said subjects, shall expire or be otherwise terminated, the provisions of this act shall be in force in all respects in the same manner and to the same extent as if no such treaty had existed at the time of the passage hereof." (22 Stat., 525, Chap. cxxi, Sec. 11.)

This section was construed by this Court in *Kelly* v. *Hedden*, 124 U. S., 196, where it was said:

> "This case, except in one particular, presents the same questions considered and determined in *Whitney* v. *Robertson*. The exceptional circumstance is this, that the act of 1883, under which the duties were levied and collected, to recover which the action is brought, declares that nothing in it 'shall in any way change or impair the force and effect of any treaty between the United States and any other government, or any laws passed in pursuance of or for the execution of any such treaty, so long as such treaty shall remain in force in respect of the subjects embraced in this act.' 22 Stat., 525. The most that can be conceded to this provision is, that it leaves a previous treaty relating to the same subjects unaffected by the act. *Our observations in the former case, as to the effect of subsequent legislation in conflict with the stipulations of a treaty, are therefore inapplicable to the present case."* (Italics ours.)

In other words, the subsequent legislation did not abrogate or repeal the stipulations of an antecedent treaty, such stipulations being expressly saved by a form of words closely analogous to Subsection 7.

The case of *Kelly* v. *Hedden* covered a shipment of sugar from San Domingo made under the Tariff Act of 1883, which contained, as we have just seen, a provision saving the treaty rights from destruction. It differed from the case of *Whitney* v. *Robertson* therein referred to, decided on the same day, in that the latter case dealt with San Domingo sugars imported in 1882 under an earlier tariff act which did not contain a clause saving the treaty rights. In both cases, however, this Court held that the absence of a reciprocal treaty with San Domingo, such as existed with Hawaii, in itself operated to exclude the sugars from free entry.

On March 3, 1891, Congress passed an act to save treaty rights to the Hawaiian Islands. That act read:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That nothing in the act approved October first, eighteen hundred and ninety, entitled 'An act to reduce the revenue and equalize duties on imports, and for other purposes,' shall be held to repeal or impair the provisions of the convention respecting commercial reciprocity concluded January thirtieth, eighteen hundred and seventy-five, with the King of the Hawaiian Islands, and extended by the convention proclaimed November ninth, eighteen hundred and eighty-seven; and the provisions of said convention shall be in full force and effect as if said act had not passed." (26 Stat., 844, Chap. 534.)

This law was acted upon by the executive officers of our Government as shown by T. D. 10824 notifying collectors and other officers of the customs of its passage.

In the Tariff Act of August 27, 1894, the proviso to the sugar paragraph (182½), reads:

> "Provided further, *That nothing herein contained shall be so construed as to abrogate or in any manner impair or affect the provisions of the treaty* of commercial reciprocity concluded between the United States and the King of the Hawaiian Islands on the thirtieth day of January, eighteen hundred and seventy-five, or the provisions of any Act of

> Congress heretofore passed for the execution of the same."[*] (28 Stat., 521, Chap. 349.) [Italics ours.]

It will be noted that this proviso treats of the same subject matter as did the Act of March 3, 1891, that is, the saving of treaty rights from the implied repeal of the later law. The draftsman of the act, however, undertook to phrase that intent in somewhat different language and adopted for the first time the precise language found in Subsection 7 here involved. Again the Executive Department acted in accordance with the terms of the proviso and, as is known, sugars from the Hawaiian Islands were granted free entry under the terms of the Act of 1894.

The same proviso in identical language is found in Paragraph 209 of the Tariff Act of July 24, 1897 (30 Stat., 168) and appears to have been similarly acted upon by the Executive Departments of our Government.

When Congress came to frame the Tariff Act of 1909, it was not necessary to save any treaty rights of the Hawaiian Islands, but it was necessary to save the treaty rights of Cuba from possible legislative destruction. This was accomplished in Section 3 of the Tariff Act of 1909 and the form of expression used was the identical form used in the Acts of 1891, 1894 and 1897 with respect to the Hawaiian Islands:

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[*] By the 5th Article of the Treaty with Hawaii of 1875, it was provided that the Convention which was to remain in force for seven years should not take effect until a law to carry it into operation had been passed by Congress. Such a law was enacted, as the Government states. It is interesting to note that thereafter the treaty was extended by a supplementary Convention and on March 3d, 1887, Mr. Tucker from the Judiciary Committee of the House made a report in which he pointed out that the extension was "proposed to be done without the consent of this House and without a law of Congress. The original treaty was conditioned for its effect in an act of Congress. That act sanctioned the terms of the treaty for seven years. This supplementary convention extends its operations for seven years more and *does not condition this extension on an act of Congress*" (H. R. No. 4177, 49th Cong., 2nd Session). Nevertheless no act of Congress was ever passed, but the supplementary Convention remained in force until the Hawaiian Islands became merged with the United States.

> "Sec. 3. *That nothing in this Act contained shall be so construed as to abrogate or in any manner impair or affect the provisions of the treaty* of commercial reciprocity concluded between the United States and the Republic of Cuba on the eleventh day of December, nineteen hundred and two, or the provisions of the Act of Congress heretofore passed for the execution of the same." (36 Stat., 83, Chap. 6, Sec. 3.)* [Italics ours.]

Section 3 was enforced by the executive departments and on all merchandise imported from Cuba during the lifetime of the Tariff Act of 1909, the regular duties were assessed under that act less the 20 per cent. reduction granted to Cuban products by the Cuban Treaty.

When Congress came to the Tariff Act of 1913, and it again became necessary to save the rights granted by the Cuban treaty, both the House and the Senate united without discussion or controversy upon the same form of expression to save treaty rights from legislative destruction as had been used in 1909—a form of expression frequently theretofore employed and invariably recognized by the executive departments of the Government as saving treaty rights without further legislation. Section IV, Paragraph B, of the Act of 1913 reads as follows:

> "That nothing in this Act contained shall be so construed as to abrogate or in any manner impair or affect the provisions of the

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*This treaty (Art. XI.) was especially conditioned upon an act of Congress.

> treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on the eleventh day of December, nineteen hundred and two, or the provisions of the Act of Congress heretofore passed for the execution of the same except as to the proviso of article eight of said treaty, which proviso is hereby abrogated and repealed." (38 Stat., 192.)

In the same way, when Congress drafted Subsection 7 with the purpose of saving treaty rights clearly before it, the same language, so well defined and understood by the legislative and executive departments, was naturally adopted.

It is therefore apparent that the framers of the Act of 1913, in Subsection 7, used a form of words which had come to be accepted as a model when it was desired to accomplish the same definite purpose.

It is futile to suggest in view of the foregoing analysis, that this language is not "apt" or that it is unfamiliar to Congress (Government Brief, 51). It is true that other forms of expression have been employed, but it is also true that in tariff legislation, as we have demonstrated, Congress has repeatedly expressed a preference for the precise form of language which we find in Subsection 7.

VI.

The Act is not to be nullified as unwise or impolitic because it may not in its immediate operation discriminate in favor of American shipping to the extent Congress intended should ultimately result.

Keep within the terms of the enactment, give to it the only meaning it can have, and there is in it neither doubt, contradiction, absurdity nor unwisdom. To find any objection to the only construction of which the Act admits, the Government turns from the statute books to the shipping statistics of the nation, and in these, and not in the terms of the statute, finds all the staple of its argument. From these it finds that the statute has to a large extent been emptied of immediate use by the proviso and so concludes that the proviso was not designed to restrict the scope of the discrimination in favor of American shipping, but to withdraw it altogether.

Take the shipping statistics out of the case, hold to the unmistakable words of the law, and there is no evidence of an *impasse,* none of a legislative deadlock, and none of a legislative fraud or farce.

The volume of imports in treaty nation vessels is relied upon as nullifying the law. And yet the law, in its proviso, plainly recognizes that there are nations with which we have reciprocal commercial agreements, and that these are not to be impaired. How many, the law does not suggest and the number is not fixed beyond enlargement or diminution. Treaty agreements are subject to change and abrogation. But as they stood, so far as the present legislative intention was concerned, they were to continue unchanged. And by the terms of the law, there was to be this discount for the benefit of the American merchant marine and as to some nations no other or higher duties upon imports in their vessels than upon like imports in our own. This, we repeat, necessarily follows from the terms of the Act. There are nations with which we have no treaties of the kind in question, and they have a trade, carried on in their ships, with this country. And the treaties with some other nations are not in all cases comprehensive of all their trade with us. So there is a considerable importation to which the discount does not apply, and as to this the American ships and as well the ships of the favored nations would have an advantage. These facts are matters of common knowledge; so much so that no evidence was introduced respecting them. Statistics compiled by the Department of Commerce, contained in reports on the "Commerce and Navigation of the United States," were available as public documents. Congress will be presumed to have been familiar with them.

Counsel are not agreed as to the amount or proportion of foreign tonnage that would share in the benefits of the discount, and the amount or proportion that would be excluded therefrom, but the meaning of the Act and its validity cannot depend upon the extent of the preponderance of the one class or the other. There is without question a large volume of imports not entitled, in any view of the law, to the discount (*infra*, VII, p. 57).

This legislation, as its history shows, was deliberately enacted with a full knowledge of the facts and circumstances to which it applied and of how it would operate and with its consequences very distinctly pressed upon the attention of Congress.

As first introduced, the subsection read simply,

> "That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares and merchandise as shall be imported in vessels built in the United States and which shall be wholly the property of a citizen thereof."

Before it passed the House it was amended to broaden its scope as to the ships coming within its provisions. Instead of being confined to "vessels built in the United States, and which shall be wholly the property of a citizen thereof," it was extended to all "vessels admitted to registration under the laws of the United States."

In this amended form it passed the House and in this form it is conceded the law would be valid, efficient, and presently effective. In this form it discriminated in favor of the shipping of the United States and was believed to discriminate against the shipping of the rest of the world.

While the bill was before the Senate the Secretary of the Treasury wrote to the Secretary of State expressing apprehension that the subsection was in "violation of many of our treaties with foreign nations" and suggesting that the opinion of the Counselor of the State Department as to its effect be secured. (Senate Document No. 179, 63d Congress, 1st session.)

The Counselor of the State Department confirmed the apprehensions of the Secretary of the Treasury, and it appeared indeed that a number of nations had made protest against the enactment of the law as in violation of the treaties with them. The Counselor, after quoting from the treaties, said (Cong. Rec., Vol. 50, Part 5, p. 4237):

> "The various stipulations above quoted suffice to show the purport of the treaty provisions with which the proposed subsection is alleged to conflict. This allegation appears to be well founded if, as seems to be the case, it is intended by the subsection to allow the discount on duties only on merchandise imported in American registered vessels. Governments having treaty stipulations with the United

> States such as those above quoted probably would not object to the discount if it were extended, in conformity with those stipulations, to merchandise imported into the United States in their respective vessels; but they would not acquiesce in a discriminatory levy of lower duties on goods imported into the United States in American registered vessels because it was called a discount. It is the fact that a lower duty is charged, and not the term by which the reduction is described, with which the department is obliged to deal."

Nothing could be more explicit than this. And it is to be observed that Mr. Moore points out the very mode of avoiding violation of treaty agreements that was adopted by Congress, viz., extension of the discount to the treaty nation vessels. Allow the discount only upon imports in American bottoms, he says, and the treaties are violated. Extend it in conformity with the treaty stipulations to imports in the vessels of the treaty nations and the treaties are not violated.

There were open then two ways of avoiding the impairment of the treaties, one was not to allow the discount at all, and the other to extend it to imports in treaty nation vessels.

The Finance Committee of the Senate chose the first method and recommended striking out the subsection, giving as a reason that it "was in contravention of some 19 or 20 treaties of the United States, without having been preceded by the courtesy of a notice of revocation and was very properly protested against by the high contracting parties with whom we had the treaties." Furthermore, the Committee said the proposed discrimination would invite retaliation from the countries discriminated against, and in this scheme of retaliation most of our opponents would have the better of it (Cong. Rec., Vol. 50, Pt. 3, p. 2515; see, also, Pt. 5, p. 4494). The Senate, pursuant to the recommendation of the Committee, struck out the section and as thus amended passed the bill.

The House, however, would not accede to the amendment and stood fast in favor of the discount so far as imports in American vessels were concerned.

The bill then went to conference and the Conference Committee restored the section as it was passed by the House and adopting the second method of avoiding impairment of the treaties added the proviso, "that nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation." In this form the section was accepted by both Houses, approved by the President and became the law of the land.

Each House conceded something and each House held to something of its views. The House of Representatives gave up, in favor of the treaties, the exclusive feature of the section as first formulated by it, and the Senate yielded its objection to the section on the score of the retaliation it would invite. The House secured the discount on imports in American vessels and the Senate the preservation of our treaty stipulations by extending the discount to imports in treaty nation vessels.

That this greatly diminished the advantage which the section in its original form immediately gave to American shipping is obvious. The proviso could have no other effect. Its plain purpose was to preserve treaty obligations and so it extended the discount to imports in treaty nation vessels. The protest of the treaty nations was not against the grant of a discount; that would violate no treaty. The protest was against a grant exclusively to American vessels, and such a grant would violate or abrogate the treaties. In recognition of the protest and to avoid impairment of the treaties, the amendment was made and the bill being so amended, Congress passed it and the President signed it.

Obviously then Congress intended to give by means of this Act some present advantage to American shipping, great or small, as the field of the practical operation of the proviso was small or great. This was not a measure of sheer folly, however great the proportion of the foreign tonnage sharing in the discount; the advantage might be enlarged from time to time by changes in our treaty agreements. It was a beginning and a substantial beginning of a policy of favor and there is nothing to indicate a purpose to make an end of it at the very moment and by the very act of bringing it into existence. But the Government's contention implies such a purpose, an implication not permitted by the terms in which the Act is expressed, not required by its underlying policy, and finding support only in an assumption of the unwisdom of the Act.

The argument of the Government might with equal force be directed against another provision of the Tariff Act,—Subsection 1 of Paragraph J of Section IV, reading as follows:

> "That a discriminating duty of 10 per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, or merchandise which shall be imported in vessels not of the United States, or which being the production or manufacture of any foreign country not contiguous to the United States, shall come into

> the United States from such contiguous country; but this discriminating duty shall not apply to goods, wares, or merchandise which shall be imported in vessels not of the United States entitled at the time of such importation by treaty or convention or Act of Congress to be entered in the ports of the United States on payment of the same duties as shall then be payable on goods, wares, and merchandise imported in vessels of the United States, * * *." (38 Stat., 195.)

This like Subsection 7 might be taken bodily out of the Tariff Act without impairing its integrity as an act imposing duties and might also well be the subject of a distinct enactment.

These two laws are of the same general nature, but operate by converse methods. The purpose of each is to promote American shipping interests and to do this without violating treaty obligations. The one allows a discount of five per cent. on all duties to the favored ships and the other adds a discriminating duty or penalty of ten per cent. on all imports by vessels not within the Congressional favor.

The penalty is plainly imposed by the general enactment contained in Subsection 1 on all imports from across seas which do not come to the United States in American bottoms, not exempting those first brought to Canada or to Mexico and then across the border to the United States. The advantage of the general enactment under each subsection falls upon the same objects. American ships and only American ships get the discount, and only American ships escape the penalty. The advantage to American shipping resulting from each of the laws in this unqualified form is very great, but we must not overlook the provisos. That of Subsection 1 is different in form from that of Subsection 7, but their effect is similar in that they both except treaty nation vessels from the discrimination. The discriminating duty is not to apply to importations by vessels of the treaty nations and the discount is to apply to such importations. In each case the advantage to American shipping conferred by the general enactment is diminished by the proviso, done in the one case by withholding the penalty, and in the other by extending the discount.

The Government does not contend that Subsection 1 is invalid and yet it undertakes to show that it has been emptied of all its use, by reason of its proviso, which is of even larger scope than that of Subsection 7, for it extends not only to treaty nation vessels, but as well to such as may by act of Congress be entitled to the same favor as American vessels. The acts of Congress referred to may be repealed and the treaties may be abrogated, one or more of them, and in the measure in which this is done, the subsection is made useful, and without any change in its own terms, without reenactment, the discriminating duty it provides for will apply, and at the last may extend to all the shipping of the world other than our own. The Government deals with this subsection as in force and effect notwithstanding that its present scope by reason of treaties and Acts of Congress is so small "that collectors of the customs have been directed to collect the discriminating duties only when thereto specifically instructed, and the records of the Treasury Department show not a dollar collected under the discriminating provision of the Tariff Act of August 5, 1909, 36 Stat., 11, 87, c. 6, Sec. 15, during the fiscal years 1910, 1911, 1912 and 1913; and not a dollar has been collected to date under this Section IV, Paragraph J, Subsection 1, of the present Tariff Act" (Government Brief, p. 73). The law is there, a valid enactment, and a change in the situation to which it is applicable, may make it of the greatest use without any change in its own terms.

Subsection 1 and also Subsection 2 (a somewhat similar provision) are in full force ready for immediate application. They are to be superseded only by treaty or by proclamation or other declaration that foreign nations do not so discriminate against the United States, but they are in effect at all times to preserve a balance. The argument that they are not operative is as fallacious as the suggestion that a statute denouncing penalties for an offence is not operative because no one commits the offence.

Moreover, it should be noted that as to Subsections 1 and 2 the conditions under which they are to be suspended are expressly stated in the statutes, either as part of the section itself as in Subsection 1, or as an independent provision as in Subsection 3. In the proviso of Subsection 7 no conditions precedent to the immediate extension of its benefits to treaty nations are found.

The Solicitor General further argues (Brief, p. 75):

> "Yet if the analogy between the two subsections is to be followed, we find that as the discriminating duty of 10 per cent. under Section 1 is in no case collected, so, also, the discriminating discount in Subsection 7 should in no case be allowed."

This is a *non sequitur*. The very reasoning which requires that the discriminating duty under Subsection 1 shall not be imposed, obviously requires that the discriminating discount of Subsection 7 shall, as to imports in treaty vessels, in no case be *denied*. Stated somewhat differently, as the discriminating duty of 10 per cent. under Subsection 1 is in no case *collected*, because all nations have brought themselves within the protection of the exception therein either by treaty or by having observed the provisions of the Act of Congress (R. S., 4228), so the discriminating discount in Subsection 7 should in no case be *denied*, where a vessel is protected against such denial by treaty.

The consistency of this legislation, the harmony of these two subsections, shows that Congress was acting deliberately and not at haphazard. Subsection 1 is a familiar piece of legislation and as the Solicitor General says (Brief, p. 70), "has been incorporated from time to time, with trifling modifications, in the several tariff acts since the policy of reciprocal immunity from discriminating duties was inaugurated." Like Subsection 7, however, its principal clause discriminated in favor of American shipping and its proviso or qualifying clause restricted that discrimination in its scope, and so much so that not a dollar of the duty through which it was to be accomplished was collected under the Tariff Act of August 5th, 1909. And yet it was incorporated in the Act of 1913 and not because of an *impasse* or of a legislative deadlock and not as a legislative fraud or farce. "A poor thing," the Solicitor General says, but Congress says "mine own."

Whatever is said of Subsection 7 is just as applicable to Subsection 1. In each case to find any support for the argument against its validity we must go outside the terms of the enactment to our shipping statistics and, finding the discrimination in favor of American shipping resulting from the actual operation of the laws not as great as we think it should be, determine that the enactment is not a wise one, and that therefore Congress did not mean what it said.

The proviso in either case certainly did not nullify the principal clause by rendering it impossible of performance. It is certainly possible to collect the discriminating duty under Subsection 1, whether it falls upon much or little of our importations. "These might be more, or might be less, or might be nothing" (*Russell* v. *Williams,* 106 U. S., 623, 625). It is equally possible to allow the discount under Subsection 7, however much or little of our importations may be entitled thereto.

We have then to deal with a law deliberately and intelligently enacted, expressed in very plain terms, and to the operation of which, according to those terms, no obstacle of any kind exists.

VII.

Substantial discrimination in favor of American vessels in fact results from respondents' construction.

As we have heretofore pointed out, we are not concerned to ascertain the precise operation of the law or the precise extent to which our shipping would be benefited by it. (*Weber* v. *Freed,* 239 U. S., 325, 330.)

Nevertheless, the brief of the Government makes it plain that its whole case rests, directly or indirectly, on the assumption that the benefit from the operation of Subsection 7 will not be so great as might be desired, and that only partial discrimination will result, from which it concludes that the subsection is a nullity. The Government has been at great pains to cull statistics from official sources in an attempt to fortify this contention, but has overlooked the fact that Congress never intended Subsection 7 to provide more than a partial discrimination in favor of American shipping. As the bill was introduced into the House and as it passed that body without the proviso, it discriminated at most to the extent of 40 per cent. of our imports, for at no stage in its history did it assume to apply the discrimination to free goods. Such goods are left on a parity as to all vessels, and they constitute 59.54 per cent. of our imports (Com. & Nav., 1914, p. xv). Manifestly it was not designed even by the House of Representatives to make the operation of the provision coextensive with the imports of the United States.

It would seem that the failure to take this fact into consideration, with the consequent confusion of dutiable and free goods, has led to serious errors in the tables set forth on pages 61 *et seq.*, of the Government's brief, the correction of which produces entirely different results.

It is of course impossible to ascertain the exact amount of discount that would be allowable to goods now imported in non-treaty vessels were they diverted to American vessels, for, as the discrimination is based upon a percentage of the duty, such a calculation rests upon the exact amount of goods imported not now entitled to the discount, and the rate that each such imported article would pay. Besides this, it would be necessary to know the origin of all goods imported in English vessels, for only the products of the British Isles would be entitled to the discount, and this would apply also to French vessels under the Government's theory, although not under ours. These facts are not ascertainable from the official statistics.

The Solicitor General, however, makes an estimate based on the average duties, and assumes to demonstrate that considering the imports for the year ending June 30, 1914, the discrimination in duties in favor of American vessels would amount to only $1,891,483 annually. This falls far short of the actual amount. Where are the errors?

A glance at the results given (Government Brief, p. 62) shows at once that something is wrong. The total discount of 5 per cent. of the duties collected on goods imported in all ships, American, treaty and non-treaty, is there stated to amount for the year ending June 30th, 1914, to $9,956,545. A simple calculation shows that this would make the amount of duties collected during that time *$199,130,900*. But according to the statement on the preceding page (61), there were imported in ships into the United States during that time goods to the value of $1,737,708,653 on which the average rate of duty was 14.88 per cent. According to this figure the duty collected was *$258,571,047*. What has become of the other $59,500,000, and the duty discrimination of $2,975,000 represented by 5 per cent. thereof? It is not difficult to find this primary error.

In the statistics given (Brief, pp. 58 *et seq.*) the imports are divided into two broad classes. Thus for the year ending June 30, 1914, the division as stated is:

Total imports in American and treaty bottoms entitled to discount	$1,084,013,731
Not clearly entitled to 5 per cent. discount	653,694,922

Each of these classes contains *both dutiable and free goods.* In the calculation of the duty collected the average ad valorem rate of 14.88 per cent. is taken upon the whole of the first item of $1,084,013,731.

This is the average rate for dutiable and free goods combined in the reference given (Com. and Nav. for 1914, p. xi). The average rate for dutiable goods alone is there given as 37.60%, but as the result, taking the importations as a whole, would be the same whether we figure on both the dutiable and the free goods at 14.88%, or on the dutiable goods alone at 37.60%, we have no fault to find at this time with this method, although it is unscientific, as hereafter pointed out.

But we do object to the application of the combined dutiable and free goods average rate (14.88%) to dutiable goods alone, as is done by the Government when it comes to discuss the value of the imports in what is called "the competitive field," and it is here that we find the primary error. There is first deducted the value of the free goods amounting to $399,463,333, from the total value of the competitive field, $653,694,922, leaving $254,231,589 as the value of the *dutiable* goods in the competitive field. The Government then proceeds to find the duty on these goods by taking the average percentage of *dutiable and free goods combined* (14.88%).

It is at once apparent that instead of taking 14.88% of the value of the dutiable goods alone ($254,231,589), there should either have been taken 37.60% of that amount, or 14.88% of $653,694,922, the value of the dutiable and free goods combined.

Using, for the sake of consistency, the latter method, it will be found that the duties in the "competitive field" will be 14.88% of $653,694,922, or $97,269,804 instead of $37,829,660. Thus the "total possible benefit to American bottoms" (5% of the duty), instead of being $1,891,483, will be $4,863,490.

This is certainly a substantial discrimination. But it will be noted that the Government's table combines the total discount to American and treaty ships and treats them as one. If we separate these two items, using its figures, and add the amount of discount on goods now carried in American ships to the possible amount that may come to them by reason of the discrimination, we find the following result:

1914

Discount to American ships	$1,439,079	
Possible from competitive field	4,863,490	
Total possible discount to American ships		$6,302,569

1913

Discount to American ships	$1,376,747	
Possible from competitive field	4,994,377	
Total possible discount to American ships		$6,373,124

The above calculations are based on the exact figures and the exact method followed by the Government, saving its primary error. We pass now to a second error.

Although the Government's brief (p. 59) calls attention to the fact that under the decision of the Court below goods in French ships would not be entitled to the discount, nevertheless it includes the value of such goods imported in French vessels in the amount entitled to the discount. Their value should, on the contrary, according to the Customs Court decision (Rec., pp. 64, 65), be transferred to the competitive field. In passing it may be said that no case involving the French treaty is before this Court. A French treaty claim appearing in one of these causes was abandoned before the Court of Customs Appeals, and was so treated in its decision.

A third manifest error appears in connection with the British indirect trade. The British treaty expressly limits the right to the discount to the *products* of the British territories in Europe; but the Government's table has treated *all* goods coming from Great Britain in British ships as entitled to the discount.

It is well known that the transhipping of goods *via* England is very heavy. It is erroneous to assume that all the vast shipping of the greatest maritime nation of the world coming from England is the product of the British Isles. Although accurate figures are lacking, we conclude from our investigation that we are more than conservative in assuming that at least 25% of goods shipped from the British Isles in British ships are not the products of British territories in Europe. We are therefore justified in transferring one-quarter of this amount to the competitive field.

With the above errors eliminated, we present a table showing more accurately the possible benefit to American shipping resulting from the allowance of the discount on American and treaty vessels. We discuss only the figures of 1914 for the sake of brevity, although like errors appear in the Government's computations for 1913.

Results of allowance of discount to United States and treaty-nation bottoms on basis of imports and duties collected for year ending June 30, 1914.

Total imports (Com. & Nav. U. S. 1914, p. xiii)		$1,893,925,657
Brought on cars and other land vehicles (p. 299)		156,217,004
Total imports in vessels		$1,737,708,653
Steam Vessels:		
Austrian	24,358,126	
Belgian	35,461,566	
Dutch	68,779,035	
German	241,318,841	
Italian	34,666,994	
Japanese	55,305,703	
Norwegian	66,440,187	
British[1]	203,490,248	
Total imports in treaty-nation bottoms		$729,820,700
Imports in American and non-treaty bottoms		$1,007,887,953
Total imports in American bottoms		$193,424,634
Total imports, the transportation of which might by possibility be diverted to United States bottoms by the 5 per cent. discount		$814,463,319
Average ad valorem rate (p. xi) per cent		14.88
Total duties thereon		$121,192,141
Discount on same at 5 per cent., representing total possible benefit to goods in American bottoms by diverting all imports in the competitive field		$6,059,607
Discount to American vessels (5% of 14.88% on $193,424,634)		$1,439,079
Total possible discount to American ships as discriminatory duties		$7,498,686

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[1] $271,320,331 less 25% assumed not to be the product of British territories in Europe.

Now, if the Government's estimate of $1,891,483 as the possible benefit to American ships from the competitive field is increased to $6,059,079 through the elimination of its errors, it is manifest that the amount of discrimination enjoyed by treaty nation vessels, which is given by it as $6,625,983 ($8,065,062 less $1,439,079 American), must be greatly reduced. Just what that amount may be is immaterial, but it is plain that it is considerably less than the amount in the competitive field, and far less than the amount that might possibly be enjoyed by American ships.

The foregoing table follows the general plan suggested by the Government with the errors corrected as above pointed out.

From the table as corrected, it will be seen that the total possible benefit to American ships from the competitive field, based upon the figures of 1914, when expressed in duty figures, is something over $6,000,000; but it should be remembered that the discrimination granted by Congress, although expressed in terms of discount of duty, was really a discrimination for the purpose of encouraging American shipping. It is plain, therefore, that the Government's table, either as given by it or as corrected by us, does not really state the discrimination in the form intended by Congress. That discrimination should properly be expressed in terms of increased American shipping rather than in terms of discount of duty.

We may, however, deduce this discrimination in terms of shipping from the duty terms of the table. We have shown that there will be a discount of over $6,000,000 in the competitive field. What does this represent? If 5 per cent. discount on the duty is $6,000,000, obviously the duty amounts to $120,000,000. The average ad valorem rate on dutiable goods is 37.60 per cent. (Com. & Nav., p. xi); so the value of the goods on which this duty is collected is approximately $320,000,000.

We are now able to understand in terms of shipping just what the discrimination in the competitive field amounts to, and we can gain a further appreciation of its significance by comparing this amount with the value of the dutiable goods imported in American vessels for the year ending June 30, 1914.

Again turning to our statistics (Com. & Nav., 1914, p. xi), we find that the average percentage of all dutiable goods imported is 40.46 per cent. The total of dutiable and free goods in American vessels being $193,424,634, we find the value of the dutiable goods to be $78,259,606.

Comparing this last figure with the amount of dutiable goods which might be diverted to American ships through the inducement of the discount, to wit, $320,000,000, we see that by this inducement the value of dutiable goods in American ships may possibly be *increased* more than four times its present amount. We might add that this disregards increased importations of free goods.* It is fair to assume that with the great possible increase in the quantity of dutiable goods carried in American vessels suggested by the above figures, there would be a substantial increase in the carrying of free goods, owing to the fact that shippers would naturally be disinclined to split their cargoes.

When we come to consider how much of this competitive field may be secured by American ships as against treaty ships, we find that the Government has again overlooked a very salient point. It is stated (Brief, 65), that only the most robust optimist could believe that this 5 per cent. discount would enable American vessels to monopolize the gross total of imports in the competitive field. We agree that American vessels could not hope to monopolize the gross total of imports; but it must be noted that in its effort to seize or monopolize the imports in the competitive field, the United States would really have but one first class competitor, namely, Germany. Neither Great Britain, the largest maritime carrier,* nor France nor Russia could enter this field, because it would not be able to offer the benefit of the discount. The next largest competitor would be Holland, whose imports to this country of goods of all nations for the year ending June 30, 1914, amounted to $68,779,035 as against $193,424,634 carried by American vessels.

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*Let us, for the purpose of avoiding all dispute, accord to the Government the reductions from the competitive field claimed as to France and England. In other words, let us assume that French goods in French vessels are entitled to the discount and that all goods coming from England are the products of the British Isles. The value of the dutiable goods remaining in the competitive field would then be $256,000,000, representing a possible increase of 3¼ times the present value of imports in American ships, without counting the free goods.

In the face of all this, how can it be said that Congress legislated unwisely? Must the American merchant marine be deprived of the chance to rehabilitate itself because in doing so it may still have to fight some competitors?

Satisfying as the above figures may be, they are, however, interesting only from a speculative standpoint. Some benefit to American shipping was intended and some benefit results, and the extent to which other nations share in that benefit affects only the question of the measure in which the obvious purpose of the act is realized in operation.

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*It might be inferred from the Government's figures (Brief, p. 62) that the British indirect trade amounted to only $399,463,333. The total imports in British vessels amounted for the year 1914 to $849,003,373 (Com. & Nav. 1914, p. 299). By the Government's figures (Brief, p. 61) only $271,320,331 of that amount was imported direct from the United Kingdom, leaving $577,683,042 for the British indirect trade.

Nor is the percentage of free goods in the British indirect trade so great as indicated by the percentages of free goods given in the list of certain countries and dependencies on pages 61, 62, of the Government's brief. Our learned adversary picks out here and there a few countries and dependencies whose percentage of free goods is high, but ignores others where the percentage of free goods is low. While he mentions Jamaica, Trinidad and Costa Rica as having a percentage of 95 to 97 free, he does not refer to the fact that the percentage for the total West Indies is 17.68 free. He picks out Japan, 78.70 per cent., but overlooks Turkey in Asia with 17.08 per cent. (Com. & Nav. 1914, p. xv). The only African country he selects is Egypt, with a percentage of 97.06. Had he considered the total British Africa he would have found a percentage of 51.49 (ibid.).

It might further be said that even if we take the percentage of free goods as stated in the Government's brief, we find about $24,000,000 of this amount on the dutiable list, yet in the calculation the entire amount is treated as free of duty. The average percentage of free goods in the British indirect trade is probably very close to the average percentage of free goods from all countries.

VIII.

The subsection became effective with the Tariff Act itself.

Finally, the Government itself recognizes that there is an intelligent policy underlying the subsection and that it admits of being put into operation, with all the intended results, but not at once. And so the view is presented that the Act may not have been stillborn, but was ushered into being in a state of suspended animation, to waken into life and activity, when the conditions under which it operates will make its operation more productive of results. But here again the shipping statistics and not the terms of the statute are appealed to for support of the argument.

So it is suggested that the law may be the present declaration of a policy of discrimination in which this Government will actively engage when, by the abrogation of existing reciprocal commercial agreements or treaties with other nations, the discrimination will be more productive of favor or benefit than now to American shipping, and until then the law is not to operate.

But the law by its plain terms is immediately effective. "A discount of 5 per centum on all duties imposed by this Act shall be allowed, etc., etc." There is no postponement on any account whatever, and no contingency stated to the happening of which the taking effect of the statute is deferred. In *Dunlap* v. *United States,* 173 U. S., 65, the act directed a refund of taxes on alcohol to be made in compliance with regulations to be prescribed by the Secretary of the Treasury, which regulations, as the Secretary pointed out to Congress could only be *formulated* at an expense of half a million of dollars, for which no appropriation was ever made (*ibid.*, p. 75). The Court held simply that the refunding could not be enforced until the regulations were made. But here there is nothing to be done by the Secretary or any other official of the Government, as a condition of allowing the discount. Nor is this act like the Canadian reciprocity act of July 26, 1911, which in terms was to become operative only when the President should issue a proclamation. The law is absolute in its mandate.

Further than this the very terms employed in the preamble of the Act of October 3, 1913, provide that the duties which it prescribes shall be levied, collected and paid on and after the day following its passage; and Paragraph U of Section IV of the Act provides:

> "U. That unless otherwise herein specially provided, this Act shall take effect on the day following its passage."

As already seen there are various provisions of the act which are in express terms postponed in operation (*supra*, p. 13), but Subsection 7 is not one of them.

The Government is not explicit as to the time when the act may take effect. It says (Brief, p. 82):

> "while the act under consideration is inoperative at this time, circumstances may arise under which it will be effective. If in the future these conflicting treaties should be abrogated or repealed, or by diplomatic negotiations be supplemented or modified, the way would be open for goods in American vessels to receive the preferential discount of 5 per

> cent. The contingency may be remote, but it is none the less possible."

This seems to us contradictory of the main argument made by the Government. The law must be in effect now as a law and according to its terms, for no re-enactment is suggested as necessary to its coming into effect. And the abrogation of the treaties is not a contingency to the happening of which the effectiveness of the law as a law is by its terms postponed. The abrogation of the treaties is not at all essential to make the law effective, but is essential to make it more efficient in operation as a measure of discrimination in favor of American shipping. It has some efficacy now; how much is a matter of dispute. The abrogation of the treaty with Italy would make it more efficient, and as one treaty after another is abrogated the act would increase in efficiency in its operation until the last treaty was out of the way. When would the law become effective so that it would operate at all, be the resulting benefits to American shipping much or little? Must it be postponed until the resulting discrimination was against the whole world, any reciprocity whatever being excluded? Or would it be enough that the discrimination was against the major portion of the foreign shipping? In any event it would be the law as it is now written, speaking as it does now, in the present tense, not deferred to any future event, that would be in operation. The remote contingency, whatever it may be, is not expressed in the law and is suggested only by the necessities of the Government's position.

IX.

Goods arriving in vessels of the United States or in vessels of treaty nations prior to October 4, 1913, warehoused on arrival and withdrawn from bonded warehouse on or after October 4, 1913, are entitled to the discount.

All our discussion on this point is based upon the assumption that the discount is allowable on goods which arrived in American or treaty nation vessels after October 3, 1913, and were entered for consumption.

The causes of *United States* v. *James Elliott & Co. et al.*, No. 499 (foreign registration); *United States* v. *Wood & Selick et al.*, No. 501 (American registration); *United States* v. *Cullman Bros. et al.*, No. 504 (foreign registration); *United States* v. *Louis Meyers & Son,* No. 506 (American registration), relate to merchandise imported prior to October 3, 1913, but withdrawn from warehouse subsequent to October 4 and liquidated under the law of 1913.

The general law as to such merchandise has long been embodied in provisions corresponding to Section III, Paragraph S, of the present law, and to Section IV, Paragraph Q, which read as follows:

> Sec. III, Par. S: Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation, *on payment of the duties and charges to which it may be subject by law at the time of such withdrawal.* [Italics ours.]
>
> Sec. IV, Par. Q: That on and after the day when this Act shall go into effect all

> goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, *shall be subjected to the duties imposed by this Act and to no other duty, upon the entry or the withdrawal thereof.* [Italics ours.]

The plain effect of this language is to put warehoused goods arriving prior to October 4, 1913, and withdrawn thereafter upon precisely the same terms as goods arriving and entered after October 4, 1913. Such provisions are entirely consistent with our settled policy with respect to warehoused goods.

Franklin Sugar Refining Co. v. *U. S.*, 202 U. S., 580.
Fabbri v. *Murphy*, 95 U. S., 191.
Hartranft v. *Oliver*, 125 U. S., 525.
U. S. v. *Goodsell*, 84 Fed. Rep., 439 (C. C. A. 2nd Circt., 1898).
Mosle v. *Bidwell*, 130 Fed. Rep., 334 (C. C. A. 2nd Circt., 1904).
Gump v. *U. S.*, 3 Ct. Cust. App., 137.

The provisions are clear and unambiguous, and provide especially for the manner in which the duties on the goods so arriving, warehoused and withdrawn, are to be ascertained. They require no interpretation.

What is the language of these two provisions with respect to duties on warehoused goods upon the withdrawal thereof? Paragraph Q says that such goods "shall be subjected to the duties imposed by this Act and to no other duty." Paragraph S says warehoused merchandise may be withdrawn on "payment of the duties and charges to which it may be subject by law at the time of such withdrawal."

Either one of the provisions above quoted fixes the duties applicable to the merchandise in question, but whichever be considered the result is the same. The duty so fixed is the duty imposed by the law at the time of withdrawal. This is the Act of 1913.

The enacting clause thereof, which precedes the dutiable list reads as follows:

> "That on and after the day following the passage of this Act, except as otherwise specially provided for in this Act, there shall be levied, collected, and paid upon all articles when imported from any foreign country * * * the rates of duty which are by the schedules and paragraphs of the dutiable list of this section prescribed."

The "dutiable list," which follows the enacting clause in the Act, prescribes various rates of duty for specific merchandise.

If it be suggested that the enacting clause is limited to "the rates of duty" which are prescribed by the "dutiable list," it must also be noted that the clause contains the words "except as otherwise specially provided for in this Act," and that the "Act" does otherwise provide as to warehoused goods in Paragraph Q and Paragraph S.

Taking up first the language of Paragraph Q; how then shall we find the duty "imposed by this Act," of which Subsection 7 is a part, on the warehoused goods withdrawn after October 4th, 1913?

The Solicitor General, adopting as his argument the language of the Board of General Appraisers, contends that Paragraph Q has no application because Subsection 7 does not "impose a duty" but "grants a reduction," and asserts that "the 'duties imposed by this Act' are such as are specifically enumerated in the first 386 paragraphs of the act" (Brief, p. 85). But, as has just been pointed out, the enacting clause of the act contemplates exceptions to this scheme of assessment.

One of these specially excepted provisions in the Act is Section IV, Paragraph B, relating to the Cuban treaty. Without this paragraph Cuban products would unquestionably be, by the enacting clause, subject to the dutiable list without reduction. Under Paragraph B and the Cuban treaty, however, a reduction of 20 per cent. from the duties fixed by the schedules is granted. Can it be said that the "duties imposed by this Act" on Cuban products are the duties "specifically enumerated in the first 386 paragraphs of the act"?

Another exception is Subsection 7. Without this provision in the Act, goods in American and treaty ships would unquestionably be, by the enacting clause, subject to the dutiable list without reduction. Subsection 7, however, grants a reduction of 5 per cent. from the duties fixed by the schedules. Can it any more be said that the "duties imposed by this Act" on goods in American or treaty ships are the duties "specifically enumerated in the first 386 paragraphs of the act"?

The "duties imposed by this Act" on Cuban products are admittedly the schedule rates with the 20 per cent. reduction under Paragraph B and the Cuban treaty. The "duties imposed by this Act" on goods in American and treaty ships are likewise the schedule rates with the 5 per cent. reduction under Subsection 7 and the treaties.

The meaning of the phrase "imposed by this Act," may be tested by assuming two importations of exactly similar merchandise in vessels of similar registry, one arriving on October 2, 1913, and warehoused; the other, arriving on October 4, 1913, and entered for immediate consumption. Assume that the warehoused importation was withdrawn for consumption on October 4, 1913, so that the duties on both were paid on the same date.

Aside from the question of the 5 per cent. discount, the Government will, of course, concede that the duties on both of these shipments paid on October 4 would be the same. But the discount would obviously be allowed on the goods entered for consumption.

What is there to distinguish the two? Paragraph Q not only says that warehoused goods may be withdrawn and be subject to the duties *imposed by the Act then in force,* but shall be subject *"to no other duty."* If the warehoused goods be denied the 5 per cent. discount, can it be said that they are subjected to no other duty than that imposed on identical goods to which the discount is allowed?

Undoubtedly the word "imposed" as used in Paragraph Q refers to "levied, collected and paid," in the enacting clause, and in this sense it obviously looks to the amount assessable and not to the manner of the assessment, for the word "imposed" is not used in the enacting clause preceding the dutiable list of the Act of 1913. The duties "imposed" under Paragraph Q must *necessarily* be the duties "levied, collected, and paid" under the Act.

Coming now to Paragraph S, it is none the less plain that, by its express terms, merchandise in bonded warehouse on October 4, 1913, without regard to the time of its arrival in this country, is entitled to be withdrawn "on payment of the duties and charges to which it may be subject by law at the time of such withdrawal." That this means the net duties payable; *i. e.*, the rates of the dutiable list with any deductions elsewhere provided by the Act, is settled law.

Identical language was construed by this Court in *Franklin Sugar Refining Company* v. *United States, supra,* where it was held that Cuban products, imported prior to the date proclaimed by the President of the United States and the President of Cuba for the commencement of the operation of the treaty, placed in bonded warehouse and withdrawn after the proclaimed date, were entitled to the reduction of 20 per cent. by virtue of the very warehouse clause with which we are here concerned, at that time being Section 20 of the Customs Administrative Act as amended December 15th, 1902 (32 Stat., 753). This section corresponded to Paragraph S, Section III. The Court said (p. 582):

> "The section needs no interpretation. It is clear that it subjects merchandise to the duties prescribed by law at the time it is withdrawn for consumption. *Mosle* v. *Bidwell,* 130 Fed. Rep., 334. And our inquiry then must be, when were the sugars in controversy withdrawn for consumption? If before December 27, 1903, they were dutiable under the act of July, 1897; if after December 27, they were entitled to 20% *reduction* of the duties prescribed by that act." (Italics ours.)

In the *Franklin* case the result was a *reduction* of duties by virtue of the warehouse provision and the treaty, the rates prescribed by the dutiable list being reduced 20 per cent. So in the present case the dutiable rates are reduced 5 per cent. by virtue of the warehouse provisions and Subsection 7.

The case of *Mosle* v. *Bidwell,* 130 Fed. Rep., 334, cited by this Court in the *Franklin* case, sustained the contention that sugar brought from Porto Rico prior to the cession of that island to the United States by the treaty with Spain, and remaining in bonded warehouse until after such cession, was entitled to free entry by virtue of the warehouse provision—the same Section 20 of the Act of June 10, 1890, as amended. This last case is especially in point, not only because it granted a reduction sufficient to wipe out the entire duty, but also because that reduction was based upon the provisions of our treaty with Spain.

The *Franklin Sugar Refining Company* case, *supra,* also effectually disposes of the Government's further contention (Brief, pp. 83 *et seq.*) that the words "shall be allowed" and "shall be imported" in Subsection 7 make the subsection applicable only to goods which *arrived* in this country after the passage of the Act. That case related to sugars which arrived and were entered for warehouse prior to the proclaimed date of the Cuban treaty. They were withdrawn after the proclaimed date, and this Court held that by virtue of the warehouse provision the discount of 20 per cent. granted by the Cuban treaty applied. Here the discount is claimed by virtue of Subsection 7 and the treaties.

The Commercial Convention with Cuba, proclaimed December 17th, 1903, declares in Article II (33 Stat., pp. 2136, 2137):

> "During the term of this convention all articles of merchandise * * * being the product of the soil or industry of the Republic of Cuba

> imported into the United States *shall be admitted* at a reduction of twenty percentum of the rates of duty thereon as provided by the Tariff Act of the United States," etc. [Italics ours.]

The situation existing in the Franklin case was far stronger for the Government than here for the Cuban treaty provides that "during the term of this convention all articles of merchandise * * * imported * * * shall be admitted" at the reduced rates. The term "imported" as there used was held in effect not to mean time of arrival since the sugars in fact *arrived* before and not "during the term of" the treaty.

Whether the word "imported" under certain circumstances might be construed to mean "arrived" is beside the mark, for the word "imported" as used in the tariff acts as applicable to warehoused goods has uniformly been construed to mean that importation is not complete until withdrawal from the warehouse. Our settled policy as to warehoused goods is that the *importation of foreign goods is not complete as between the importer and the Government, so long as the goods remain in the custody of the officers of the Customs,* and until on withdrawal they enter into the commerce of the country in competition with domestic products.

In *Fabbri* v. *Murphy,* 95 U. S., 191, 197, the Court in discussing the then existing warehouse provision, said:

> "Throughout those provisions, the plain inference is that Congress did not regard the importation as complete while the goods remained in the custody of the proper officers of the customs."

In *Hartranft* v. *Oliver,* 125 U. S., 525, this Court said, referring to a warehouse provision that goods withdrawn should be subject to no other duty than if the same were imported after the withdrawal date:

> "The plain meaning of this section is, that, though goods are imported before the act takes effect, yet if they are kept until after that period in a public store or bonded warehouse, that is, in the custody and under the control of officers of the customs, they shall be subjected only to the duties thereafter leviable when they are entered for consumption * * *. In other words, goods imported before the act took effect, if kept in the custody and control of the government, are to be charged with duties according to the law in force when they were entered for consumption; that is, when passed over to the control of the importer or owner. * * * There is manifest justice in the rule that goods thus withheld from the control of the owner or importer shall be subject only to such duties as are leviable by the law when he is at liberty to take possession of them. Ordinarily, goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse, and thus the designation of the goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody."

See also, *Sherman* v. *Robertson,* 136 U. S., 570, following *Hartranft* v. *Oliver, supra; United States* v. *Goodsell, supra.*

The Court of Customs Appeals said, in *Gump* v. *U. S., supra*:

> "Although in fact brought into this country under the prior law no duty had been paid on the merchandise because advantage had been taken of the provisions of the law [referring to the warehouse provisions of the Tariff Act

> of 1909], which made it possible to defer such payment until it was entered for consumption —in other words, until it became a part of the merchandise of the country—so that the entire act of importing goods for consumption was still incomplete, and the completion thereof required a withdrawal from the warehouse and such proceedings as would admit them to consumption here. We think this may be as well designated by the term 'withdrawal entry' or 'entry for withdrawal' as any, because it is the final act of entry which withdraws the merchandise from bonded warehouse and completes the importation of merchandise designed to become a part of commerce here.
>
> "It is not the name by which it is called, but the fact accomplished thereby that becomes important. The goods were in bond; they must be removed therefrom to complete the importation; * * *."

The learned Solicitor General would have this Court substitute in Subsection 7 the words "as shall arrive" for the words "as shall be imported." In so doing he is attempting to legislate and not construe. His argument that the discount clause was intended to operate only on future importations, using the word "importation" in a narrow sense of "future arrivals," is met by the decisions of this Court already reviewed and in this case by the Court of Customs Appeals with the reply that the merchandise in bonded warehouse at the time of the passage of the Act *had not been imported* and could not be considered legally as imported until withdrawn from warehouse.

It follows, therefore, that the warehoused merchandise was "imported" under the Act of 1913, and is subject under Paragraph Q to the duties "imposed by this Act and to no other duty," or under Paragraph 8 to the duties to which it is "subject by law" at the time of withdrawal. Such duties, we have established, are the specific duties in the "dutiable list," less the 5 per cent. discount under Subsection 7.

X.

If the 5 per cent. discount be allowed at all, Cuban merchandise is entitled to it.

The Government says in its brief (p. 90):

> "It is therefore conceded for present purposes that if the 5% discount be allowed at all, it should be allowed on Cuban goods imported in American bottoms in addition to the 20% preferential rate provided in the treaty" (Brief, pp. 90, 91).

The respondents are therefore relieved of the necessity of arguing this point.

In Conclusion.

Whether the policy of the Government should be one of discrimination or of reciprocity was for Congress to determine, and it did by this Act determine in favor of discrimination. We had treaties with several nations of a nature contravening this policy—agreements of reciprocity—and attention being called to the fact that these might be abrogated by the Act without notice to the foreign nations concerned, to avoid such a discourtesy the proviso was added so as to keep and maintain the treaty obligations until they were changed after due notice and negotiation. The law was effective at once, but its immediate use was restricted, because the treaty agreements restricted the field of its operation. But that field was substantial and could be enlarged to any extent and as rapidly as this Government desired, and so the use of the statute would be increased. But always and from the beginning the statute had some use of the kind intended, increasing from time to time as the field of its operation was extended. And conceding only that the policy of discrimination is a wise one, there is nothing vain, insincere, absurd or contradictory in such a law.

The judgments of the Court of Customs Appeals should be affirmed.

Respectfully submitted,

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February, 1916.

APPENDIX A.

Cause No.	Title	Origin and Kind of Merchandise*	Nationality of Vessel
496	The United States vs. The M. H. Pulaski Company et al.		Netherlands
			Belgium
		Linen handkerchiefs and linens manufactured in Ireland	Great Britain
497	The United States vs. R. B. Henry Company et al.		Austro-Hungary Germany Germany Italy Netherlands Norway Spain
498	The United States vs. James Elliott & Company et al.	Merchandise of the produce and manufacture of Great Britain	Great Britain
			Belgium
499	The United States vs. J. Wile Sons & Company		United States
500	The United States vs. Robert Muller & Company		Netherlands
501	The United States vs. Wood & Selick et al.		Netherlands United States

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*Not given unless the product of Cuba or imported in British vessels.

Date of Arrival	Entered in Bond for Warehousing Prior to the Taking Effect of the Tariff Act of October 3, 1913	Date of Entry	Withdrawn from Bonded Warehouse for Consumption and Duties Paid under Paragraph Q, Section IV, of the Tariff Act of October 3, 1913
October 7, 1913	No	October 7, 1913	
October 6, 1913	No	October 6, 1913	
October 7, 1913	No	October 7, 1913	
October 11, 1913	No	October 11, 1913	
November 12, 1913	No	November 12, 1913	
October 17, 1913	No	October 17, 1913	
October 8, 1913	No	October 8, 1913	
October 7, 1913	No	October 7, 1913	
October 9, 1913	No	October 9, 1913	
October 15, 1913	No	October 15, 1913	
July 9, 1912	Yes	July 9, 1912	After October 4, 191
June 24, 1913	Yes	June 24, 1913	After October 4, 191
October 17, 1913	No	October 17, 1913	
October 14, 1913	No	October 14, 1913	
October 17, 1913	No	October 17, 1913	
September 16, 1913	Yes	September 16, 1913	After October 4, 191

ause o.	Title	Origin and Kind of Merchandise	Nationality of Vessel
2	The United States vs. E. La Montagne's Sons	Gin manufactured or produced in England	Great Britain
3	The United States vs. Albert Lorsch & Company et al.	Products of England	Germany Japan Austro-Hungary Italy Great Britain
4	The United States vs. Cullman Brothers et al.		Netherlands Netherlands
5	The United States vs. G. W Faber, Inc.	Cigars the product of Cuba	United States
6	The United States vs. Louis Meyers & Son		United States
7	The United States vs. William Openhym & Sons et al.		United States
8	The United States vs. Park & Tilford	Cigars the product of Cuba	United States
9	The United States vs. Seigas & Company	Tobacco the product of Cuba	United States

Date of Arrival	Entered in Bond for Warehousing Prior to the Taking Effect of the Tariff Act of October 3, 1913	Date of Entry	Withdrawn from Bonded Warehouse for Consumption and Duties Paid under Paragraph Q, Section IV, of the Tariff Act of October 3, 1913
October 6, 1913	No	October 6, 1913	
October 10, 1913	No	October 10, 1913	
October 22, 1913	No	October 22, 1913	
October 18, 1913	No	October 18, 1913	
October 29, 1913	No	October 29, 1913	
November 12, 1913	No	November 12, 1913	
July 22, 1913	Yes	July 22, 1913	After October 4, 19
May 19, 1913	Yes	May 19, 1913	After October 4, 19
October 7, 1913	No	October 7, 1913	
September 16, 1913	Yes	September 16, 1913	After October 4, 19
October 7, 1913	No	October 7, 1913	
October 16, 1913	No	October 16, 1913	
October 7, 1913	No	October 7, 1913	

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

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THE UNITED STATES, PETITIONER, *v.* R. B. HENRY CO. ET AL.	No. 497.
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No. 504.

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No. 505.

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LOUIS MEYERS & SON.
No. 506.

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WILLIAM OPENHYM & SONS ET AL.
No. 507.

THE UNITED STATES, PETITIONER,
v.
PARK & TILFORD.
No. 508.

THE UNITED STATES, PETITIONER,
v.
SELGAS & CO.
No. 509.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

These fourteen cases, known as the "Five Per Cent Discount Cases," are here on certiorari to judgments of the Court of Customs Appeals, rendered on May 25, 1915 (6 Ct. Cust. App. —).

They involve claims made by sundry importers under section IV, paragraph J, subsection 7, of the tariff act of October 3, 1913, 38 Stat. 114, 192, 196, c. 16. This subsection reads as follows:

> That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided,* That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

THE TREATIES.

At the date of the passage of this act there were in force between the United States and nearly all of the commercial countries of the world treaties of "commerce and navigation" guaranteeing to the ships and cargoes of the treaty nations when entering each other's ports reciprocal immunity from discriminating duties. These treaties, with the years of their inauguration, are as follows:

> Argentine Republic, 1853, Art. VI, 10 Stat. 1005, 1007; Austria-Hungary, 1829, Art. III, 8 Stat. 398, 399; Belgium, 1875, Art. V, 19 Stat. 628, 630; Bolivia, 1858, Art. IV, 12 Stat. 1003, 1006; China, 1880, Art. III, 22 Stat. 828, 829 (continued by treaty of 1903, Art. XVII, 33 Stat., pt. 2, 2208, 2215); New Granada (Colombia), 1846, Arts. IV,

> VI, 9 Stat. 881, 882, 884; Corea (Korea), 1882, Art. V, 23 Stat. 720, 722; Costa Rica, 1851, Art. IV, 10 Stat. 916, 918; Denmark, 1826, Art. III, 8 Stat. 340, 11 Stat. 719; France, 1822, Arts. I, II, VII, 8 Stat. 278, 280; Great Britain, 1815, Art. II, 8 Stat. 228 (indefinitely extended by the treaty of 1827, 8 Stat. 361); Greece, 1837, Arts. III, IX, 8 Stat. 498, 500, 502; Hanseatic Republics, 1827, Art. I, 8 Stat. 366; Honduras, 1864, Art. VI, 13 Stat. 699, 702; Italy, 1871, Arts. I, V, 17 Stat. 845, 847; Japan, 1911, Art. VIII, 37 Stat., pt. 2, 1504, 1506; Liberia, 1862, 12 Stat. 1245; Mecklenburg-Schwerin, 1847, Art. I, 9 Stat. 910, 911; Netherlands, 1852, Art. I, 10 Stat. 982; Norway, 1827, Arts. III, V, 8 Stat. 346, 348; Paraguay, 1859, Arts. VI, VIII, 12 Stat. 1091, 1094; Prussia, 1828, Arts. III, IV, 8 Stat. 378; Spain, 1902, Art. VIII, 33 Stat., pt. 2, 2105, 2109; Sweden, 1827, Arts. III, V, 8 Stat. 346, 348.

Those portions of the same which are material to the present inquiry are printed as Appendix "A."

As a typical example of the treaties above enumerated, save those with Costa Rica, France, Great Britain, and Honduras, Articles III and IV of the treaty with Austria-Hungary of 1829 may be cited:

> ART. III. All kind of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which

may be lawfully imported into the ports of the dominions of Austria, in Austrian vessels, may also be so imported in vessels of the United States of America, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said States, may also be so imported in Austrian vessels, without paying other or higher duties or charges, of whatever kind or denomination levied in the name, or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

ART. IV. To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles, are, to their full extent, applicable to Austrian vessels and their cargoes, arriving in the ports of the United States of America; and, reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports

> of the country to which they respectively belong, or from the ports of any other foreign country.

The Germanic treaties, it should be noted, embrace those made with the Hanseatic Republics, 1827, Article I, 8 Stat. 366; the Grand Duchy of Mecklenburg-Schwerin, 1847, Article I, 9 Stat. 910, 911; and the Kingdom of Prussia, 1828, Articles III and IV, 8 Stat. 378. These treaties, it is conceded by all parties, are now binding upon both the United States and the German Empire. See *Terlinden* v. *Ames,* 184 U. S. 270; *Disconto Gesellschaft* v. *Umbreit,* 208 U. S. 570, 581.

The treaties with Costa Rica, France, Great Britain, and Honduras guarantee freedom from discriminating duties only with reference to goods, the growth, produce or manufacture of the contracting nations. Thus, Article II of the treaty of 1815 with Great Britain provides (8 Stat. 228, 229):

* * * * *

> The same duties shall be paid on the importation into the United States of any articles, the growth, produce, or manufacture, of his Britannick majesty's territories in Europe, whether such importation shall be in vessels of the United States or in British vessels, and the same duties shall be paid on the importation into the ports of any of his Britannick majesty's territories in Europe of any article the growth, produce, or manufacture, of the United States, whether such importation shall be in British vessels or in vessels of the United States.

The treaties with Costa Rica and Honduras are substantially similar.

The treaty with France of 1822, 8 Stat. 278, on the other hand, provides for discriminating duties, but these are to be reduced annually and have long since been abolished in accordance with the terms of the treaty.[1] The pertinent articles of this treaty are the following:

> ART. 1. Articles of the growth, produce, or manufacture, of the United States, im-

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[1] In the compilation of Treaties and Conventions, published by the State Department in 1889, Sen. Ex. Doc. No. 47, 48th Cong., 2d sess., the treaty of 1822 is cited as in force. The compilation was published in response to a resolution of the Senate dated January 5, 1885, directing such treaties or parts of treaties as had been changed or abrogated to be indicated. *Id.*, p. iv.

That the reciprocal abolition of discriminatory duties was the object of the treaty of 1822 appears from the correspondence leading up to the treaty. Sen. Docs. Nos. 352 and 353, 17th Cong., 2d sess., American State Papers, vol. 5, Foreign Relations, pp. 141 to 213. See especially pp. 167, 209.

Volume 5, Moore's International Law Digest, sec. 765, p. 259, states:

"By Article VII of the Treaty of Commerce between the United States and France of June 24, 1822, provision was made for the gradual abolition of all discriminating duties so that a perfect equalization was to be effected on October 1, 1827."

In a letter dated Paris, March 27, 1830, to the Prince de Polignac, Minister Secretary of State for Foreign Affairs of France, the American Minister (Wm. C. Rives) stated (Ex. Docs., 22d Cong., 2d sess., vol. III, 1832–33, Doc. No. 147, pp. 97–98):

"Since the 1st of October, 1827, from which period, under the operation of the commercial convention of 1822, the discriminating duties on both sides have in great part ceased.

ported into France in vessels of the United States, shall pay an additional duty, not exceeding twenty francs per ton of merchandise, over and above the duties paid on the like articles, also of the growth, produce, or manufacture, of the United States when imported in French vessels.

ART. 2. Articles of the growth, produce, or manufacture, of France, imported into the United States in French vessels, shall pay an additional duty, not exceeding three dollars and seventy-five cents per ton of merchandise, over and above the duties collected upon the like articles, also of the growth, produce, or manufacture, of France, when imported in vessels of the United States.

* * * * *

ART. 7. The present temporary Convention shall be in force for two years from the

---

French vessels are admitted into the ports of Louisiana, and the other ports of the Union, on the same terms (with the exception of a trifling remnant of the ancient discriminating duties) as the vessels of the United States themselves; and as soon as France will consent to abolish that remnant of discrimination, her vessels will be received, to the fullest extent, and in every respect, on the same terms as national vessels."

In the collection of Treaties and Conventions between the United States and Foreign Powers, entitled the American Diplomatic Code, published in 1834 by Jonathan Elliot, a note to the treaty of 1822, after quoting from Article 7, proceeds as follows (vol. I, p. 183):

"* * * This convention not having terminated, in consequence of the notification of either party, American and French vessels, laden with the produce of their respective countries, continue to be received into the ports of each other, on the same and equal terms."

> first day of October next, and even after the expiration of that term, until the conclusion of a definitive treaty, or until one of the parties shall have declared its intention to renounce it; which declaration shall be made at least six months beforehand.
>
> And in case the present arrangement should remain without such declaration of its discontinuance by either party, the extra duties specified in the 1st and 2d articles, shall, from the expiration of the said two years, be, on both sides, diminished by one-fourth of their whole amount, and, afterwards, by one-fourth of the said amount from year to year, so long as neither party shall have declared the intention of renouncing it as above stated.

It should be noted, also, as a fact to which further reference will be hereinafter made, that in addition to the field covered by these treaties the policy of shipping reciprocity has been extended by legislation and executive action thereby authorized so as to include the ships of practically all the nations of the world. It may be said with substantial accuracy that at the date of the adoption of this tariff act not a vessel entered the ports of the United States which was not exempt by law from any form of tariff discrimination.

CLASSES OF CASES.

Under this subsection of the tariff act and these treaties claims to the reduction of five per cent on duties otherwise imposed by the act are preferred by three classes of claimants:

First. Importers of goods in vessels admitted to registration under the laws of the United States. Such are the foregoing cases of *United States* v. *J. Wile Sons & Co.; United States* v. *G. W. Faber, Inc.* (Cuban cigars); *United States* v. *Louis Meyers & Son; United States* v. *William Openhym & Sons et al.; United States* v. *Park & Tilford* (Cuban cigars); and *United States* v. *Selgas & Co.* (Cuban tobacco).

Second. Importers of goods in vessels registered under the laws of treaty nations. Such are the cases of *United States* v. *The M. H. Pulaski Co. et al.* (goods imported in a Dutch and Belgian vessel and Irish goods imported in a British vessel); *United States* v. *R. B. Henry Co. et al.* (Austro-Hungarian, Italian, Norwegian, Dutch, Spanish, and German vessels); *United States* v. *Robert Muller & Co.* (Dutch vessel); *United States* v. *Wood & Selick et al.* (Dutch vessel); *United States* v. *La Montagne's Sons* (British vessel and British goods); *United States* v. *Albert Lorsch & Co. et al.* (French, German, Japanese, Austro-Hungarian, Italian, and British vessels); *United States* v. *James Elliott & Co. et al.* (Belgian vessel and British goods in British vessel).

Third. Importers of goods brought into the United States before the 3d day of October, 1913, entered without payment of duties and under bond for warehousing, this merchandise being, in turn, of two classes, (*a*) that imported in vessels of United States registry (*United States* v. *Wood & Selick et al.*), and (*b*) that imported in vessels of treaty nations (*United States* v. *James Elliott & Co. et al.*, Belgian vessel and British goods in British vessel; *United States* v. *Cullman Bros. et al.*, Dutch vessel).

The Secretary of the Treasury, upon advice of the Attorney General, directed the customs officers to reject claims in all these cases. In his letter of instructions to customs officers, under date of November 8, 1913, T. D. 33847, he said:

> The Attorney General having been asked for an expression of his views upon the interpretation of subsection 7 of paragraph J of section 4 of the tariff act of October 3, 1913, he advises the department that the 5 per cent discount to American vessels only, which was the primary object of the subsection, can not be given without impairing the stipulations of existing treaties between the United States and various other powers and that consequently the subsection, by the express terms of the proviso, is inoperative.

The Board of General Appraisers sustained the contentions of the claimants of the first class, but overruled the contentions of claimants of the second and third classes (R. 23, 36). The Board considered the discount to be a favor extended only to American bottoms, and that as such it might be enforced notwithstanding the treaties, because the treaties embodied only executory promises, binding on the political departments of the Government, the breach of which was a political question not within judicial cognizance.

The Court of Customs Appeals sustained the contentions of all claimants (R. 39, 41; Opinions, R. 43 *et seq.*). The majority of the Court of Customs Appeals, considering the treaties to be self-executing, held that they prescribed rules to be enforced by the courts and that the proviso against their impairment was tantamount to an express grant to treaty bottoms.

For the Government it was and is contended that the subsection in clear terms and for the purpose of favoring American shipping alone limited the discount to American vessels; that such a preference, however, would clearly contravene existing treaties; and that whether these latter are self-executing or executory, the proviso forbidding a construction hostile to their covenants forbids also the allowance of the discount proposed. The legislative history of the act, the language employed, the manifest design of Congress, and the absurd consequences of a contrary interpretation, all tend to render this conclusion imperative.

An incidental question was raised in the court below as to the allowance of the discount on importations of Cuban goods in American bottoms, in addition to the 20 per cent preferential discount provided by the treaty with Cuba of December 11, 1902, 33 Stat. 2136, and the act of Congress of December 17, 1903, 33 Stat. 3, c. 1, passed to carry it into effect. The question is not presented here, for it is now conceded that the importers' claims in this respect are valid if a discount may be allowed in any case.

Unless otherwise stated, page references are to the transcript of record in *United States* v. *R. B. Henry Co. et al.; United States* v. *James Elliott & Co. et al.; United States* v. *J. Wile Sons & Co.*, Nos. 497, 498, and 499, respectively.

THE ISSUES.

1. May the 5 per cent discount provided in section IV, paragraph J, subsection 7, be allowed on importations in any case whether (*a*) in vessels admitted to United States registry or (*b*) in vessels of the treaty nations?

2. If the subsection is not altogether void of immediate effect, are goods brought to our shores and entered under bond for warehousing prior to October 3, 1913, but on which duties were not paid until the time of withdrawal after that date, entitled to the discount?

BRIEF OF ARGUMENT.

I. The legislative history of section IV, paragraph J, subsection 7, shows it to be the result of a vain effort to compose differences between the House, which favored discriminating duties to American vessels, and the Senate, which resisted a disturbance of existing treaties.

II. The subsection is void by reason of the irreconcilability of its main clause and proviso; or at least is without present force or effect.

1. The discount can not be allowed to goods *in American vessels alone,* because, so construed, the subsection would abrogate, impair or affect the provisions of existing treaties.

2. The discount can not be allowed to *both American and treaty vessels.* Such was manifestly not the intent of Congress, nor is it the legal consequence of the words employed.

3. Since it is impossible to give to the act any application to existing circumstances, it must be declared void, or operative only upon future condition.

III. In no event may the discount be allowed on goods entered without payment of duty and warehoused prior to October 3, 1913, and not withdrawn until after that date.

IV. The cases of Cuban importations present no separate question.

ARGUMENT.

I.

THE LEGISLATIVE HISTORY OF SECTION IV, PARAGRAPH J, SUBSECTION 7, SHOWS IT TO BE THE RESULT OF A VAIN EFFORT TO COMPOSE DIFFERENCES BETWEEN THE HOUSE, WHICH FAVORED DISCRIMINATING DUTIES TO AMERICAN VESSELS, AND THE SENATE, WHICH RESISTED A DISTURBANCE OF EXISTING TREATIES.

1. It was the purpose of the House to limit the discount to goods in American vessels only, thus discriminating in their favor against the ships of all other nations.

The language which the House employed to accomplish its purpose was clear and unambiguous. As introduced in that body by Mr. Underwood on April 7, 1913, the clause in question read:

> Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels built in the United States, and which shall be wholly the property of a citizen thereof.

Before the bill was again reprinted it was determined to broaden the grant and extend it not only to vessels built in the United States but to all vessels admitted to registration under the laws thereof. Accordingly in the reprint of April 21 the subsection read:

> Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and

> merchandise as shall be imported in vessels admitted to registration under the laws of the United States.

In this form the bill passed the House. Cong. Rec., 63d Cong., 1st sess., vol. 50, pt. 2, pp. 1387, 1428.

The words plainly limit the discount to American bottoms. The terms are unmistakable. Unless the importing vessel is admitted to registration under the laws of the United States the duties on goods therein must be paid, without reduction, at the rates elsewhere provided in the tariff act. The proceedings in the House demonstrate that this was the fixed and deliberate intent of that body.

The Ways and Means Committee in its report accompanying the bill (Rept. No. 5, p. LII, 63d Cong., 1st sess., Apr. 22, 1913; Cong. Rec., *id.*, pt. 1, pp. 316, 743) explains this subsection as follows:

> It is a discrimination in favor of American shipping similar to the provisions of some of the first tariff bills that were enacted by the Congress of the United States. Under like legislation the merchant marine of the United States was encouraged and developed in the early decades of the last century until our merchant marine became the largest carrier of merchandise in the world. We believe that to again discriminate in favor of American shipping will build up our merchant fleet and keep at home millions of dollars that are now being paid to foreign

> vessels to carry the products of our country to foreign markets.

The policy of discrimination in favor of American vessels began with the Government. The "first tariff bills" referred to provided discriminating duties favoring American vessels exclusively, and were intended to operate to the disadvantage of the vessels of every other nation. The second act of the first Congress, approved July 4, 1789, was a tariff act. 1 Stat. 24, 27. Section 5 allowed a discount of 10 per cent on all duties imposed by the act on articles imported in vessels belonging to citizens of the United States. The second tariff act, approved August 10, 1790, 1 Stat. 180, c. 39, by section 2 imposed an additional duty of 10 per cent on importations in foreign vessels. This provision was subsequently reenacted, from time to time, without substantial change until 1816. 1 Stat. 260, 392, 411, 504; 2 Stat. 84, 299, 769, 804. The policy of shipping reciprocity began only with the act of March 3, 1815, 3 Stat. 224, c. 77, and the British treaty of that year, but thereafter broadened steadily. Beyond doubt it was these earlier exclusive acts which the Ways and Means Committee commended to the imitation of Congress.

Mr. Underwood, the chairman of the committee, said (Cong. Rec., *id.*, pt. 1, p. 744):

> * * * section 7 of paragraph J is a discriminating duty given by this country to its own ships and in favor of its own ships.

And, again, in reply to a suggestion from Mr. Mann that perhaps the discount might be extended by reason of existing treaties to foreign vessels, Mr. Underwood said (Cong. Rec., *id.*, pt. 2, p. 1358):

> Now, there are gentlemen who contend that if subsection J were enacted law it would mean, instead of discriminating in favor of American shipping, that we will reduce the duties on all imported goods coming into this country by foreign vessels by reason of treaty rights. I never have believed in that contention. I do not think it is a fair construction of the law; but I have in my office here letters transmitted to me by the State Department from three of the leading maritime nations of the world, protesting against this section, because they say it is a discrimination against their vessels. Now if the contention that is being made by gentlemen on that side of the House is correct, that goods coming from Germany, or France, or England would be admitted 5 per cent cheaper than they would if this section was removed, I can not see why the ambassadors from three great maritime nations should protest against this paragraph. It may be that the chancellors, supposed to be learned in the law of nations, supposed to be here to guard their own countries, are mistaken as to the effect of this paragraph, and that the gentlemen on that side of the House are better lawyers as to the effect on their commerce and their ships than are the

> chancellors, but I am inclined to think that with the weight of their protests leaning in favor of the construction that I placed on this paragraph in the opening of this debate, it is safe to say that in the end this construction will be maintained.

The debates on the bill, which may be consulted, of course, to ascertain the evil aimed at, the legislative history of the act, and the environment at the time of its enactment (*Blake* v. *National Banks*, 23 Wall. 307, 319; *Jennison* v. *Kirk*, 98 U. S. 453, 459; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 465; *Binns* v. *United States*, 194 U. S. 486, 495, 496; *Standard Oil Co.* v. *United States*, 221 U. S. 50; *Lapina* v. *Williams*, 232 U. S. 78, 89, 90; *Tap Line Cases*, 234 U. S. 1, 27; *Seven Cases, Eckman's Alterative* v. *United States*, opinion rendered Jan. 1C, 1916), show beyond peradventure that the evil aimed at was the decadence of the American merchant marine.

The subject was not a new one. There had been for many years a widespread demand for some kind of remedial legislation to resuscitate our languishing maritime industries. This induced the President in his annual message of December 7, 1903, to urge upon Congress the appointment of a commission to investigate and report "what legislation is desirable or necessary for the development of the American merchant marine and American commerce." S. Rept. No. 2755, 58th Cong., 3d sess., p. I. Congress responded with the act of April 28, 1904, 33 Stat. 561, c. 1813, which created "The Merchant Marine Commission," consisting of five Senators and five Representatives from both political parties. The commission held sessions at all the principal seaports and lake ports in the United States, at which a vast amount of testimony was taken, and reported to Congress January 4, 1905. Cong. Rec., vol. 39, pt. 1, pp. 437, 449. All of the members agreed that the existing policy of shipping reciprocity was at the root of the evil. The only division was as to the remedy. A majority recommended the granting of subsidies to countervail the subsidy policy of foreign nations, while the minority proposed abrogation of the treaties and imposition of discriminating duties. S. Rept. No. 2755, 58th Cong., 3d sess., pp. I, LIII; Cong. Rec., vol. 50, pt. 5, p. 4499. The bill recommended by the majority failed because of a general public sentiment against the granting of subsidies, and the proposal of the minority became the policy of those of the Sixty-third Congress, who inspired the subsection in question.

It was charged against the long-continued policy of reciprocity that it had been subverted by the foreign powers to their own advantage. They had very cleverly nullified their own obligations to maintain shipping equality by granting ship subsidies, while preventing our abrogation of the treaties and reciprocity laws by inducing the fear of retaliation. Mr. Gallinger, the former chairman of the Merchant Marine Commission, said, referring to the committee report when this subsection was under consideration in the Senate (Cong. Rec., *id.*, pt. 5, p. 4499):

> It may be said in passing that when Great Britain and other foreign nations secured the commercial agreements to which I have alluded, they very cunningly nullified to a large extent their obligations under the agreements by granting subsidies to their vessels engaged in the foreign trade.

In order to exhibit the condition of American shipping as it was seen by Congress, it is necessary only to refer to the statistics for the year ending June 30, 1913 (Com. and Nav., p. 869), showing that of 3,081 vessels plying that year in the trade from Europe to America only 67 were under the American flag.

As stated by the Merchant Marine Commission in a memorandum quoted for the information of Congress during the debate on the present act (Cong. Rec., *id.*, pt. 5, p. 4499), "an American vessel, even direct from the United States, is seldom seen now in European waters."

That the decline of American shipping was progressive also appeared to Congress. As the minority opinion of the Court of Customs Appeals puts it (R. 91):

> * * * In 1795, 92 per cent of our imports and 88 per cent of our exports were so

> carried; in 1826, 95 per cent of our imports and 89.6 per cent of our exports; in 1830, 93.6 per cent of our imports and 86.3 per cent of our exports; in 1845, 87.3 per cent of our imports and 75.3 per cent of our exports; in 1860, 63 per cent of our imports and 69.7 per cent of our exports; in 1870 American ships carried 35.6 per cent of our foreign trade, which has gradually declined to 9.4 per cent in 1912 and 8.7 per cent in 1913.

This was the deplorable condition of the American merchant marine. It called—so thought those who favored the act—for a change of policy; a change from the old policy of reciprocity in favor of foreign vessels to a new policy of real discrimination in favor of American ships. Attention was called again and again to the growth and development of our marine in the early days under a policy of discriminating duties and to its subsequent decline coincident with, if not caused by, the abandonment of that policy. There was no hint of any desire to aid the shipping of any foreign nation; nor was Congress actuated by any altruistic motives toward our commercial rivals. There was no design to benefit the American merchant marine and its competitors alike; but boldly to assist the former by the specific method of discriminating duties at the expense, if need be, of the latter, any treaties to the contrary notwithstanding.

2. The Senate was equally determined to brook no disturbance of existing treaties.

The tariff bill containing this subsection in the form above given passed the House on May 8, 1913 (Cong. Rec., *id.*, pt. 2, p. 1387), was transmitted to the Senate, and referred to its Committee on Finance on May 16. That committee struck out the clause in question and reported the bill to the Senate with the following explanation of its action (Cong. Rec., *id.*, pt. 3, pp. 2506, 2507, 2515):

> Your committee struck out subsection 7 of paragraph J, page 263, giving a discount of 5 per cent on all duties upon goods imported in American bottoms. The provision was in contravention of some 19 or 20 treaties of the United States, without having been preceded by the courtesy of a notice of revocation, and was very properly protested against by the high contracting parties with whom we had the treaties. In our opinion it would have led to no good result, as every other country could have retaliated, and all the countries at the end would have been just about where they started. Moreover, the country which could use that principle with most force and effect in injuring other countries would be the country with the largest merchant marine, and the country which could least effectively use it would be the country with the smallest merchant marine. We were therefore not only inviting an endless retaliation but a retaliation where our

> opponents would have had in nearly every case the better of it, and in many cases infinitely the better.

No little debate ensued. A resolution was adopted (S. Res. No. 165, 63d Cong., 1st sess., Cong. Rec., *id.*, pt. 4, p. 3494) calling upon the Secretary of State to transmit copies of all objections or protests made by foreign nations against the adoption of the paragraph as enacted by the House, and such documents were transmitted. S. Doc. No. 179, 63d Cong., 1st sess., Cong. Rec., *id.*, pt. 5, p. 4237. It appeared that there were some 20 or more countries with which we had treaties, of which 10 or 11 had already protested to the Secretary of State. Cong. Rec., *id.*, pt. 5 ,p. 4498. The letter of the Secretary of State was accompanied by one written by Counselor Moore, of the State Department, to the Secretary of the Treasury. It appeared that the latter officer had called the attention of the Secretary of State to the pending provision, saying:

> It has been pointed out to me, directly and indirectly, that this provision may result in the violation of many of our treaties with foreign nations, and is almost sure to result in international complications and diplomatic negotiations. Consequently, I earnestly suggest the advisability of submitting to the counselor for the State Department or such other officer as you may deem proper the question as to whether or not this provision is in violation of any existing treaty rights. [Letter of the Secretary of the Treasury May 26, 1913; Cong. Rec., *id.*, pt. 5, p. 4237.]

In response to this inquiry Counselor Moore called attention to the treaties hereinbefore enumerated and said (Cong. Rec., *id.*, pt. 5, p. 4237):

> The various stipulations above quoted suffice to show the purport of the treaty provisions with which the proposed subsection is alleged to conflict. This allegation appears to be well founded if, as seems to be the case, it is intended by the subsection to allow the discount on duties only on merchandise imported in American registered vessels.

The then Solicitor for the Department of State, Mr. Folk, writing to the Chairman of the Finance Committee of the Senate, said (Cong. Rec., *id.*, pt. 6, pp. 5345, 5346):

> * * * Presuming that the effect of the enactment into law of the provision granting to importations in vessels of the United States a discount of 5 per cent on the duties levied by the act would be to permit the entry of goods imported in American vessels at a lower rate of duty than that charged on the same kind of goods imported in foreign vessels—a judicial question—then there would seem to be no question that the result would be a violation of treaty provisions, such as those above referred to, obligating this Government not to impose on the cargoes of the foreign vessels higher or other duties than those imposed on the cargoes of its own vessels.

The effect upon the treaties was further emphasized by adducing memoranda from the report of the Merchant Marine Commission on the policy of discriminating duties, which was incorporated in the Record (Cong. Rec., *id.*, pt. 5, p. 4499), stating that—

> * * * In the first place, there were the 30 commercial treaties with foreign Governments—the very foundation of our modern commercial relations—which prohibit both discriminating custom duties and discriminating tonnage dues. These treaties of course could be abrogated, but notice of this would have to be given a year in advance, and new treaties without a discriminating duty clause negotiated on terms as favorable as before.

Mr. Jones was the especial champion in the Senate of the provision as it came from the House. In discussing the conditions which enlisted his support of the bill, he said (Cong. Rec., *id.*, pt. 5, p. 4494):

> In 1885 our ships carried $194,865,743 of our foreign trade, while foreign ships carried $1,274,384,309 or six times as much. In 1913 our ships carried $378,234,924, while foreign ships carried $3,375,284,022, or nearly ten times the amount carried in our own ships. * * *
>
> Not only is this condition of things humiliating and unprofitable, but it is actually dangerous. British ships transport the greater

> part of our foreign commerce. Suppose England should engage in a war with a great power. Thousands of her ships would be taken for transports and other thousands might be destroyed. Our foreign commerce would be destroyed, and the products we now send abroad would be left on our hands, glutting our markets and bringing upon us industrial ruin and widespread commercial disaster.

He continued (p. 4495):

> Why is it that our merchant marine is no more? Why was it that from 1826 down to the beginning of the Civil War our share of our carrying trade grew steadily less?
>
> The answer is plain to me. The legislation of the fathers had been so successful in promoting our shipping trade and industry that our people came to the conclusion that we could command the seas against any competitor, and so in 1815 a treaty was entered into with England reciprocally removing the discriminating duties on goods brought into each country in the ships of the other and similar treaties were made with other countries. These treaties were usually made for a definite time and afterwards renewed to continue in force until abrogated by either party after a year's notice, the right of abrogation being expressly reserved to each party. Our shipping had received such an impetus from the encouragement given by the legislation of the fathers that it more than held its own, and in 1828 Congress

> passed an act which reads as follows: [An Act providing for reciprocal immunity from discriminating duties. See R. S., sec. 4228].
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> This act not only permitted the ships of a nation to bring in the products of that nation, but also the products of all other nations free from discriminating duties;

and he submitted a table showing the gradual decline of the American carrying trade.

He was fully conscious of the conflict between the proposed policy and existing treaties, but undeterred by it he offered the following substitute for the words agreed to be stricken out (Cong. Rec., *id.*, pt. 5, p. 4494):

> J. Subsection 7. That upon all goods, wares, and merchandise imported under the provisions of this act in vessels not built or not registered prior to the passage of this act under the laws of the United States, there shall be imposed and collected a duty of 10 per cent ad valorem in addition to the duties otherwise imposed by this act, and on such goods, wares, and merchandise as are otherwise admitted free there shall be imposed and collected a duty of 5 per cent ad valorem if imported in vessels not built or not registered under the laws of the United States: *Provided,* That the President is directed to cause to be abrogated without unnecessary delay, and in the manner therein provided, all treaties which contravene this provision;

> and, until so abrogated, this provision shall not apply to goods, wares, and merchandise imported in vessels affected by such treaties.

In continuing the discussion, Mr. Williams, speaking in defense of the action of the Committee on Finance, said (Cong. Rec., *id.*, pt. 5, p. 4501):

> It is true that to some extent the committee was persuaded by the fact that the United States had 29 treaties with 29 different countries, pledging its word of honor to a certain policy with regard to equality of admission of ships and equality of treatment of imports coming in foreign ships with imports coming in our own. We thought we should be showing very scant courtesy to these 29 nations if, without the notice of abrogation provided in these treaties, we merely repealed the treaties by an act of Congress. But that was not our main purpose at all, because we could have reported an amendment to the bill providing for notice of abrogation.
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> The main reason was this: We knew, everybody knew, anybody of common sense might know, that if we said to France, to Germany, to Great Britain, to the balance of the world, "We are going to reduce our import duties 5 per cent when articles come to our country in our bottoms," they would have said, "Well, we will do the same thing when your exports come to our country in our bottoms as our imports." In other words, there would have been an endless retaliation, which would have amounted to no good to anybody.

The proposed substitute was accordingly rejected (Cong. Rec., *id.*, pt. 5, p. 4548), and thereupon Mr. Jones proposed a further amendment, adding to the subsection as it passed the House the following:

> *Provided,* That the President is directed to cause to be abrogated without unnecessary delay, and in the manner therein provided, all treaties which contravene this provision; and, until so abrogated, this provision shall not apply to goods, wares, and merchandise imported in vessels affected by such treaties.

This amendment likewise the Senate rejected, and then, upon a yea-and-nay vote, agreed to the amendment reported by the committee striking out the entire clause.

It is apparent, therefore, that the Senate was fully persuaded that the language of the House could be interpreted only as in violation of existing treaties. It regarded itself no doubt as the peculiar guardian of our treaty relations, and for this reason, among others, refused to concur in the manifest design of the House.

3. The conference committee vainly endeavored to harmonize these divergent and wholly irreconcilable purposes.

There was thus, when the bill went to conference, a hopeless disagreement between the House and Senate; one insistent that a discrimination should be made in favor of American vessels, with the consequent impairment of treaty obligations; the other equally determined that treaty obligations should not be so abrogated, impaired or affected.

Subsection 7, as enacted, is in no sense an adjustment of this difference; on the contrary it merely gave voice to the deadlock without pretending to solve it.

In the form in which it now appears, it was reported to both Houses by the conference committee on September 30, 1913. Cong. Rec., *id.,* pt. 6, pp. 5222, 5227. The conference committee sought to recognize the views of the House and incorporated in the purview of the subsection the exact wording of the House. At the same time it endeavored to express the irreconcilable purpose of the Senate by adding the words—

> *Provided,* That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

Nothing was stated in the report of the conference committee to either house as to the meaning of this proviso, or what was intended to be accomplished by it. The subject of tariff revision had been long before Congress and the country, the time for action had come, and the adoption of the conference report followed in the House immediately upon its submission on the 30th day of September, and in the Senate on the 2d day of October. The debate on its adoption was perfunctory. This particular clause, however, did not escape criticism.

Mr. Penrose, speaking for the minority in the Senate, said (Cong. Rec., *id.*, pt. 6, p. 5343):

> I also observe with great regret, Mr. President, that the 5 per cent reduction on goods brought here in American vessels in the House bill and stricken out in the Senate was not put back in conference. It is said that this was done because the treaties must not be impaired. It seems to me that this is a judicial question, and we might well have taken this step in the interest of American shipping and ascertained later on whether it would hold or not.

Mr. Payne, speaking for the minority in the House, said (Cong. Rec., *id.*, pt. 6, p. 5237):

> * * * They had a provision in the bill of a discount of 5 per cent duty on goods brought in in American ships. Well, I told the House I thought that might be a good provision, but that would not work, because it abrogated all the treaties. That went in, it went over to the Senate, and they considered it and then struck it out. The conferees have agreed to it with a proviso that absolutely destroys the force of it.
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> They provided that it shall not abrogate or impair any treaty. Now you see it and now you do not see it.

So, in the effort at legislative accommodation, there was added to the wholly unambiguous language of the House a proviso which sought, under the guise of a rule of construction, to declare the directly hostile purpose of the Senate.

A discussion of the resulting *impasse* may well be prefaced by the language of Mr. Justice Holmes in *United States* v. *Plowman,* 216 U. S. 372, 375:

> * * * It is not unknown, when opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective.

II.

THE SUBSECTION IS VOID BY REASON OF THE IRRECONCILABILITY OF ITS MAIN CLAUSE AND PROVISO; OR AT LEAST IS WITHOUT PRESENT FORCE OR EFFECT.

The legislative history of the subsection demonstrates that it is the mere expression of a legislative deadlock. The legal result of the terms used is what one would naturally expect. The subsection would be quite as intelligible if it read:

> *Be it enacted, &c.,* That existing treaties of commerce and navigation are hereby abrogated: *Provided,* That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any such treaty.

The respect properly due the legislative branch of the Government can not be permitted to blind the eyes of the judiciary to things as they are. A bicameral legislature, like every other governmental institution, has its weaknesses as well as its strength. The checks of one body upon the other can not operate to prevent hasty and ill-advised legislation without at times defeating legislation that may be desirable. The necessity for a compromise of conflicting views may lead the way to that moderation which is the surest line of progress. Or, again, it may prove that in an effort at compromise the proposed statute has been emptied of all force and power. Such is the case at bar.

In answer to the Government's assertion that the act is of no effect emphasis is laid upon the familiar rules that the legislature is not to be presumed to have done a futile thing, and that courts in the interpretation of statutes must adopt, if possible, that construction by which the statute will prevail and not fail. Accordingly the claimants insist that the act must be interpreted, after the fashion of the Board of General Appraisers, as allowing a discount to goods in American vessels alone, or, preferably, in accord with the Court of Customs Appeals, as extending the same favor to all goods in either American or treaty-nation bottoms.

The canons of construction relied upon are of course well established, but they are controlled in this instance by others of greater force. The construction adopted must be one founded upon the language employed in the statute, and it must do no violence to the intent of the legislature if that be ascertainable. Anything other than this is not interpretation but judicial legislation. It is submitted that both the one and the other of the constructions proposed must fail by these tests.

1. The discount can not be allowed to goods in American vessels alone, because, so construed, the subsection would abrogate, impair or affect the provisions of existing treaties.

During the formative stages of this subsection the House, the Senate, the legal officers of the Department of State, and the diplomatic representatives of treaty powers, all, as we have seen, evidenced their conviction that a discriminatory grant to goods in American vessels alone would abrogate or impair existing treaties. The Attorney General so ruled, and the Court of Customs Appeals has so decided. The only dissenting voice is that of the Board of General Appraisers, who, holding the treaties to be not self-executing, and indeed unconstitutional, declared their observance or nonobservance a political question beyond judicial cognizance, and who, therefore, thought it possible to ignore the treaties and enforce a discount in favor of goods in American vessels, the proviso to the contrary notwithstanding.

In the discussion by court and counsel which these cases have hitherto provoked much has been said of the character of these treaties, as either self-executing or executory, and various conclusions have been deduced from the one or the other premise. A discount granted to American vessels alone would seem in either aspect of the matter to be obnoxious to the language of the proviso—

> That nothing in this subsection shall be so construed as to abrogate or in any manner

> impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

The Government therefore conceives that the definition of the treaties is after all immaterial, although it is convinced that they are in character purely promissory. The extent, however, to which this phase of the matter has been heretofore discussed warrants, at the cost of digression, some enlargement upon the topic at this time.

a. If self-executing, the treaties would be abrogated or impaired by such a grant.

Even if the treaties were self-operative, could it be argued that immediately upon a legislative grant of discriminating duties to goods in American vessels there would follow from the treaty *proprio vigore* a like grant to goods in treaty bottoms? Obviously this argument would beg the entire question. Do not the treaties promise equal *legislative* treatment to goods in domestic and treaty bottoms alike? If so, does not a law which grants to goods in domestic bottoms a special privilege clearly and expressly violate this promise?

Granting to a self-executing treaty the force of municipal law, there still remains the well-settled power of Congress to abrogate or impair it by a later act inconsistent with its terms. Though a treaty and a statute are presumed not to be in conflict until the contrary clearly appears, yet where an act passed subsequent to a treaty is plainly inconsistent with the latter the latest expression of the legislative will must prevail, and the treaty is *ipso facto* annulled. *Taylor* v. *Morton,* 2 Curtis, 454; *Cherokee Tobacco Case,* 11 Wall. 616; *Head Money Cases,* 112 U. S. 580; *Whitney* v. *Robertson,* 124 U. S. 190; *Chae Chan Ping* v. *United States,* 130 U. S. 581; *United States* v. *Lee Yen Tai,* 185 U. S. 213; *Hijo* v. *United States,* 194 U. S. 315; *Sanchez* v. *United States,* 216 U. S. 167; *Rainey* v. *United States,* 232 U. S. 310.

Even a statute insuring equal treatment to foreign and domestic vessels would fall before a later act granting special privileges to domestic vessels only. These treaties, though conceded for the sake of argument to be self-operative and to have the force of municipal law, are in no better case.

b. The treaties are, as a matter of fact, not self-executing but executory; nevertheless, Congress did not design to contravene them.

It is clear, on both reason and authority, that the treaties under discussion are in fact not self-executing, but are merely executory promises, binding upon the legislative branch of the Government. The language of the treaty with Austria-Hungary, which is quoted above, is:

> * * * may also be so imported in Austrian vessels, without paying other or higher duties or charges, of whatever kind or denomination levied in the name, or to the

> profit of the Government, the local authorities, or of any private establishments whatsoever;

or in the slightly different but equivalent phraseology of the Italian treaty:

> * * * no other or higher duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other.

This is the language of contract; and since the power to levy and collect duties is vested in Congress, and in Congress alone, the contract is one whose fulfillment is addressed solely to that body. In the familiar language of the Chief Justice in *Foster* v. *Neilson,* 2 Pet. 253, 313:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
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> In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to per-

> form a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

The treaties at bar fall within the class last enumerated. Their covenants are observed, in a negative sense, so long as Congress refrains from enacting any discriminatory tariffs. In the affirmative, they are to be performed by a repeal of such discriminatory tariffs as may have existed at the time of their ratification. Action and inaction alike rest with the legislative branch.

Congress has given abundant evidence that this is its own conception of the matter. For instance, when the reciprocal treaty of 1815 with Great Britain was ratified there was, as pointed out above (*supra*, p. 17), a statute imposing an additional duty of 10 per cent on all importations in foreign vessels. Congress perceived that the maintenance of this discrimination was inconsistent with the treaty, and that the treaty did not work of itself a repeal of the statute. Accordingly it passed the act of March 1, 1816, 3 Stat. 255, c. 22, in the following language:

> * * * That so much of any act as imposes a higher duty of tonnage, or of impost on vessels and articles imported in vessels of Great Britain, than on vessels and articles imported in vessels of the United States, contrary to the provisions of the convention be-

> tween the United States and his Britannic majesty, the ratifications whereof were mutually exchanged the twenty-second day of December, one thousand eight hundred and fifteen, be, from and after the date of the ratification of the said convention, and during the continuance thereof, deemed and taken to be of no force or effect.

Similar legislative action was taken subsequent to the convention with France of 1822 by the act of March 3, 1823, 3 Stat. 747, c. 25, which repealed the inconsistent act of May 15, 1820, 3 Stat. 605, c. 126, and enacted the rates agreed to in the convention. See also act of May 6, 1822, 3 Stat. 681, c. 56, sec. 2. This treaty had been sent to the House on February 20, 1823, in order to adopt "the necessary measures for carrying it into execution." Am. St. Papers, vol. 5, For. Rel., p. 222. Again, the treaty with France of 1831, Article 7, 8 Stat. 430, 432, provided for duties on French wines less than those of the existing tariff act of May 24, 1828, 4 Stat. 309, c. 113. Congress deemed it necessary to enact the lower treaty rates and provided that they should have effect retroactive from the date of exchange of ratifications. Act of July 13, 1832, sec. 10, 4 Stat. 574, 576, c. 199.

The operation of certain subsequent treaties looking toward the modification of existing tariff schedules has been by express clauses made contingent upon the action of Congress. Treaty with Great Britain of June 5, 1854, Article 5, 10 Stat. 1089, 1092 (see act of August 5, 1854, 10 Stat. 587, c. 269; act of March 2, 1855, 10 Stat. 632, c. 144); treaty with Great Britain May 8, 1871, Article 33, 17 Stat. 863, 874 (see act of March 1, 1873, 17 Stat. 482, c. 213); convention with Hawaii January 30, 1875, Article 5, 19 Stat. 625, 627 (see act of August 15, 1876, 19 Stat. 200, c. 290); treaty with Cuba of December 11, 1902, 33 Stat. 2136, 2143 (see act of December 17, 1903, 33 Stat. 3, c. 1). As is said in Crandall, Treaties, their Making and Enforcement (p. 145):

> From this historical review it appears that whatever may be the *ipso facto* effect of treaty stipulations, entered into by the President and Senate, upon prior inconsistent revenue laws, not only has the House uniformly insisted upon, but the Senate has acquiesced in, their execution by Congress.

See also Butler on Treaty-Making Power of the United States, vol. 2, chapter 12; Willoughby on Constitution, sec. 209.

Having in mind the negotiation of other treaties similar to that of 1815 with Great Britain, and perceiving that such a treaty of itself would not work a repeal of outstanding statutes, Congress made general provision for this contingency by such acts as those of March 3, 1815, 3 Stat. 224, c. 77, January 7, 1824, 4 Stat. 2, c. 4, and May 24, 1828, 4 Stat. 308, c. 111, the latter of which has persisted to this day and is now upon the statute books, with slight modifications, as section 4228 of the Revised Statutes. (*Post*, p. 71.) These acts empower the President to suspend as to any particular nation discriminating duties when satisfied that the nation in question no longer discriminates against the United States. In still other instances, Congress, when imposing discriminatory duties, has expressly exempted goods covered by treaty. (*Post*, pp. 51 *et seq.*, 70.) It is by force of these and similar statutes and not of the treaties *proprio vigore* that such discriminating duties as have been embodied in later acts have not been collected upon goods arriving in vessels of those nations which, either by treaty or by custom, do not discriminate against the United States.

The question has been directly decided. In the leading case of *Taylor* v. *Morton*, 2 Curtis, 454, there was considered the commercial treaty with Russia of December 18, 1832, 8 Stat. 444, 446, Article VI of which provided:

> No higher or other duties shall be imposed on the importation into the United States, of any article, the produce or manufacture of Russia * * * than are, or shall be, payable on the like article, being the produce or manufacture of any other foreign country.

It was contended that this treaty was self-operative and extended *proprio vigore* to importations of Russian hemp a preferential rate of duty granted by statute to hemp imported from India.

Mr. Justice Curtis, then on circuit, held to the contrary, saying (p. 462):

> The truth is, that this clause in the treaty is merely a contract, addressing itself to the legislative power. The distinction between such treaties, and those which operate as laws in courts of justice, is settled in our jurisprudence.

This case was affirmed by this court in 2 Black, 481, merely, however, on questions of procedure; but it has been uniformly cited and relied upon in matter of principle in the numerous cases which have since arisen involving a similar question. See *Whitney* v. *Robertson*, 124 U. S. 190, 194; *Rainey* v. *United States*, 232 U. S. 310, 316.

There is nothing to the contrary in the case of *Oldfield* v. *Marriott*, 10 How. 146, cited and relied upon in the majority opinion of the Court of Customs Appeals. Nor does that case, as therein supposed, involve in any way an assumption that treaties such as those under consideration are self-executing in character. The court was there considering the language of the tariff act of July 30, 1846, 9 Stat. 42, 49, c. 74, which exempted from duty—

> * * * coffee and tea, when imported direct from the place of their growth or production, in American vessels, or in foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties, tonnage, and other charges * * *.

The sole question, as stated by Mr. Justice Wayne in delivering the opinion, was whether under the treaty with Portugal the vessels of that nation fell within the clause described. If so, their cargoes were entitled to free entry, not by force of the treaty, but by force of the statute itself. This issue was found against the importer.

So in the case of *Olsen* v. *Smith,* 195 U. S. 332, in which also the Court of Customs Appeals sought to find support for its theory of the self-executing character of these treaties. The case involved a Texas statute concerning pilotage, which made certain exemptions to vessels in the coasting trade. The court went so far only in the consideration of the asserted conflict between the statute and the treaty with Great Britain as to point out that the provision of the latter for reciprocal treatment had to do solely with vessels in the foreign and not in the coasting trade; and therefore, without more saying, it dismissed the subject, which was in fact quite subsidiary to the main issues.

But though the treaties are executory and not self-executing, it does not follow, as the Board of Appraisers held, that they are to be ignored by the courts in the present instance. On the contrary, by the proviso which the conference committee added to this subsection, Congress has in terms admonished the courts "that nothing in this subsection *shall be so construed* as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation." There is of course no doubt that Congress well knew what the treaties were to which it had reference and that it did not pause to concern itself with any consideration of their character. It is obvious that it did not intend or desire to contravene them. The proviso can be read only as a declaration of its intent to forego any such result. If to the plain and explicit words of the main clause granting a preference to American vessels, there can be given no meaning not in conflict with treaty promises, it follows that the subsection is *ex vi termini* inoperative.

There is no escape therefore from the conclusion that the discount can not be allowed at this time to goods in American bottoms alone.

2. The discount can not be allowed to goods in both American and treaty vessels. Such was manifestly not the intent of Congress, nor is it the legal consequence of the words employed.

When we turn to the alternative suggestion of allowance upon goods in both American and treaty vessels we confront obstacles which are certainly no less serious. This reading will be found upon consideration to be not only without support in the language employed, but foreign to any and all purposes which Congress had in view.

a. The language of the act does not support the construction suggested.

We search the subsection in vain for any language which in terms confers this discount upon goods in vessels of both classes. Yet a favor of this sort to foreign as well as to domestic vessels is of such far-reaching consequence, it affects so largely the national revenues, the language by which it may be accomplished is capable of such definite and exact statement, and, as we shall see, was so familiar to the legislative mind, that no just rule of construction would tolerate such a grant by mere implication. *Interstate Commerce Commission* v. *Cincinnati etc. Ry. Co.*, 167 U. S. 479, 495. There are peculiar reasons for adhering to this principle in the present instance.

The proviso was not intended to enlarge the operation of the discount clause, but, on the contrary, to restrict it.

The enacting clause of the subsection reads as follows:

> That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States.

There can be no mistake about the meaning of these words: Rates of duty have been specifically fixed; a discount from these rates is allowed to goods in American vessels only.

The proviso contains no words of enlargement. It simply adds that "nothing in this subsection," *i. e.,* in the antecedent enacting clause, "*shall be so construed* as to abrogate or in any manner impair or affect the provisions of any treaty." This purports to be merely a rule of construction, and the courts are directed by it to lay the main clause of the subsection alongside the treaties and give to the main clause no interpretation which is in conflict with the promises of the latter. The language is nothing more, as has been said, than a declaration disclaiming any intention to do that which the discount clause would otherwise have accomplished, namely, a contravention of treaty provisions. It says, in effect, that the discount clause shall operate provided it does not contravene any treaty; and, conversely, that it shall not operate if it does. *Austin* v. *United States,* 155 U. S. 417, 431, and cases cited.

It is true that a proviso which in form does not contain words of enlargement may be given that effect, not, however, as a proviso, but as an independent item of legislation wherein the word "provided" is used as the equivalent of "but" or "and" in order to distinguish the different paragraphs or sentences. *Georgia Banking Co.* v. *Smith,* 128 U. S. 174, 181; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 37. But in the present case the proviso was obviously intended to perform the usual office of a proviso, which is to "limit and restrict the operation of the enacting clause." *Patterson* v. *Winn,* 11 Wheat. 380, 388; *Voorhees* v. *The Bank of the United States,* 10 Pet. 449, 471; *United States* v. *Dickson,* 15 Pet. 141, 165; *Minis* v. *United States,* 15 Pet. 423, 445; *Georgia Banking Co.* v. *Smith, supra; Austin* v. *United*

States, supra; *Quackenbush* v. *United States*, 177 U. S. 20, 26; *White* v. *United States*, 191 U. S. 545, 551; *Pennington* v. *United States*, 231 U. S. 631, 637, 638.

Upon the argument in the court below attention was called by counsel for the importers to section IV, paragraph B, of the tariff act of 1913, which provides:

> That nothing in this Act contained *shall be so construed as to abrogate or in any manner impair or affect the provisions of the treaty* of commercial reciprocity concluded between the United States and the Republic of Cuba on the eleventh day of December, nineteen hundred and two, or the provisions of the Act of Congress heretofore passed for the execution of the same except as to the proviso of article eight of said treaty, which proviso is hereby abrogated and repealed. [Italics ours.]

The similarity in phraseology between the italicized language of this paragraph and that of the proviso under consideration was pointed out, and it was insisted that the function which appellees ascribe to the latter proviso is identical with the function performed by this paragraph B.

It is clear, as we think, that in this counsel were mistaken. On the contrary, precisely the reverse is true, for the clause quoted is purely restrictive, performing the normal and typical office of a proviso, and does not serve in any way to enlarge that which precedes it. Section IV, paragraph B, excludes from the general operation of the tariff act of 1913 those subjects covered by the Cuban treaty and the statute passed pursuant thereto, being as to the latter a typical clause of nonrepeal. It was designed to carve out of a class described in general terms a smaller class identified by reference to an antecedent statute or treaty. The clause is not designed to insert into or add to a class previously defined those not otherwise within the language used. In short, the difference between this Cuban clause and the proviso at bar *as the latter is construed by the appellees* is that between limitation and extension, restriction and expansion, exception and inclusion, subtraction and addition. The court is asked to hold that language substantially similar can be used in section IV, paragraph B, to restrict general terms, and in paragraph J, subsection 7, of the same act to enlarge a specific grant. We submit, on the contrary, that the function is indeed the same in each case and in both purely restrictive.[1]

In order to hold, as did the court below, that the instant proviso operates to enlarge the discount clause, words of enlargement would have to be introduced into it, in violation of the established rule that language necessary to carry out an unexpressed legislative intent can not be supplied.

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[1] The same thing may be said of like language in the acts of March 27, 1804, 2 Stat. 299, c. 57, sec. 6; February 5, 1816, 3 Stat. 253, c. 10, sec. 3; and January 14, 1817, 3 Stat. 344, c. 3, sec. 1, which were cited by counsel for a similar purpose.

"When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe." *Hobbs* v. *McLean*, 117 U. S. 567, 579.

See also to same effect: *United States* v. *Union Pac. R. R. Co.*, 91 U. S. 72, 85; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 36; *United States* v. *Goldenberg*, 168 U. S. 95, 103; *Dewey* v. *United States*, 178 U. S. 510, 521; *United States* v. *First National Bank*, 234 U. S. 245, 262.

It must be remembered in this connection that the discount clause is itself an exception to the general law, made in favor of American vessels. The rule against supplying language omitted by design or mistake would seem to be conspicuously applicable in such a case. The failure to except, *eo nomine*, any other than American vessels from the general rates of duty is tantamount to a declaration that all other vessels shall be governed by the general law. *Bend* v. *Hoyt*, 13 Pet. 263, 271, 273; *Taylor* v. *Morton*, 2 Curtis, 454, 461–462; *Hobbs* v. *McLean*, *supra*; *Whitney* v. *Robertson*, 124 U. S. 190, 193–194.

The discount is, pro tanto, an exemption from taxation. Such exemptions are not to be raised or extended by implication.

Furthermore, the discount granted in favor of American vessels is, to the extent of the discount, an exemption from the normal rate of import duty.

An exemption from taxation is never to be implied. In order to exist it must appear from express language and so clearly as to leave no room for controversy. *Bailey* v. *Magwire,* 22 Wall. 215, 226; *Central Railroad & Banking Co.* v. *Georgia,* 92 U. S. 665, 674; *Bank of Commerce* v. *Tennessee,* 161 U. S. 134; *Ford* v. *Delta and Pine Land Co.,* 164 U. S. 662, 666 *et seq.; Metropolitan Street Ry. Co.* v. *New York,* 199 U. S. 1, 36; *Morris Canal Co.* v. *Baird,* 239 U. S. 126, 133. It can not be said that the language of this statute was intended, beyond question, to grant an exemption to foreign vessels.

Congress was fully advised of the apt words proper to accomplish an extension of the grant, and declined to use them.

Why did Congress refrain from the use of simple and direct language to express with precision that which is now sought to be implied from the restrictive proviso? If apt language was familiar in tariff legislation, the reason must be that Congress did not intend to accomplish the result which would have been attained by use of the familiar terms. *United States* v. *First National Bank, supra,* p. 50.

The first tariff act proposed after the United States had definitely embarked on its policy of shipping reciprocity was the act of April 27, 1816, 3 Stat. 310, 313, c. 107, section 3 of which reads as follows:

> That an addition of ten per centum shall be made to the several rates of duty above

> specified and imposed, in respect to all goods, wares, and merchandise, on the importation of which in American or foreign vessels a specific discrimination has not been herein already made, which, after the said thirtieth day of June, one thousand eight hundred and sixteen, shall be imported in ships or vessels not of the United States: *Provided,* That this additional duty shall not apply to goods, wares and merchandise, *imported in ships or vessels not of the United States, entitled by treaty, or by any act or acts of Congress, to be entered in the ports of the United States, on the payment of the same duties as are paid on goods, wares and merchandise, imported in ships or vessels of the United States.* [Italics ours.]

This proviso or its equivalent was subsequently reenacted in connection with each succeeding similar discrimination until 1846. 3 Stat. 458, 459; 4 Stat. 25, 29; *id.* 583, 592; 5 Stat. 548, 561.

From 1846 to 1861 no additional duty was imposed on importations in foreign vessels, but exemptions from duty were allowed on coffee and tea imported in American vessels, and the exemption was in each case expressly extended to the vessels of reciprocal treaty nations. The free list of the tariff act of July 30, 1846, 9 Stat. 42, 49, c. 74, contained the following:

> * * * coffee and tea, when imported direct from the place of their growth or production, in American vessels, *or in foreign*

> *vessels entitled by reciprocal treaties to be exempt from discriminating duties* * * *. [Italics ours.]

This provision was subseouently reenacted in the act of March 3, 1857, 11 Stat. 192, 194, c. 98, and the act of March 2, 1861, 12 Stat. 178, 193, 194, c. 68.

The tariff act of August 5, 1861, 12 Stat. 292, 293, c. 45, sec. 3, provided:

> That all articles, goods, wares, and merchandise, imported from beyond the Cape of Good Hope *in foreign vessels, not entitled by reciprocal treaties to be exempt from discriminating duties,* tonnage, and other charges, and all other articles, goods, wares, and merchandise not imported direct from the place of their growth or production, *or in foreign vessels, entitled by reciprocal treaties to be exempt from discriminating duties,* tonnage, and other charges, shall be subject to pay, in addition to the duties imposed by this act, ten per centum ad valorem: *Provided,* That this rule shall not apply to goods, wares, and merchandise imported from beyond the Cape of Good Hope in American vessels. [Italics ours.]

Section 17 of the tariff act of June 30, 1864, 13 Stat. 202, 215, c. 171, reads as follows:

> That a discriminating duty of ten per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, and merchandise which, on and after the day this act shall take

> effect, shall be imported in ships or vessels not of the United States: *Provided,* That this discriminating duty shall not apply to goods, wares, and merchandise which shall be imported, on and after the day this act takes effect, ***in ships or vessels not of the United States, entitled, by treaty or any act or acts of Congress, to be entered in the ports of the United States on payment of the same duties as shall then be paid on goods, wares, and merchandise imported in ships or vessels of the United States.*** [Italics ours.]

This discrimination with its proviso was subsequently reenacted without substantial change until 1897. R. S., sec. 2502; 22 Stat. 488, 491; 26 Stat. 567, 616; 28 Stat. 509, 550. The tariff act of July 24, 1897, section 22, 30 Stat. 151, 209, c. 11, contained a like discrimination and proviso, with the addition of a clause to cover importations from noncontiguous foreign countries brought in through contiguous territory. In that form the same provision was reenacted as section 15 of the tariff act of August 5, 1909, 36 Stat. 11, 87, c. 6; and in that form it appears in subsection 1 of paragraph J, section IV, of the present tariff act of October 3, 1913.

Thus we see that for nearly a century Congress had used definite and practically uniform language to describe those foreign treaty vessels to which it desired to extend the same exemptions and privileges enjoyed by vessels of the United States. Never at any time did it resort to a proviso like that under consideration for the purposes of such description. Indeed, simultaneously with the passage of this very subsection 7 it used in the same section of the present tariff act (sec. IV, J, subsection 1) the familiar phraseology which it had theretofore employed. Must it not be concluded that the absence of such language from subsection 7 was deliberate and intentional, and that if Congress had in fact desired to extend this discount to both American and treaty vessels it would have cast the subsection in the following form:

> That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States, *or in foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties;*

or as follows:

> That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States, *or in ships or vessels not of the United States entitled by treaty to be entered in the ports of the United States on payment of the same duties as shall then be paid on goods, wares, and merchandise imported in ships or vessels of the United States.*

b. The proposed construction is at war with the congressional intent.

We know of no argument that can be advanced—certainly there is no authority that can be cited—to justify the introduction into a statute of language deliberately omitted which is plainly contrary in effect to the language actually used. Whatever may justify the addition of language, such a course must lack all semblance of merit unless demanded by a clear showing of the legislative intent.

In entering upon this branch of the discussion, the position of the Government must not be misunderstood. It does not yield its contention that in employing the terms of subsection 7 as reported from the conference committee Congress disclosed its positive intent that the 5 per cent discount should be allowed in no case if such allowance to goods imported in American bottoms would impair an existing treaty; that the language permits no other reading; and that there is a distinction in this respect between the ultimate intent which the act expresses and the motive of those who initiated it.

This motive, as hereinbefore shown, was to confer some substantial benefit upon American vessels—a fact which the majority of the Court of Customs Appeals fully recognized, holding that—

> the enactment of the subsection was the adoption of a policy of discrimination in favor of American vessels.

Accepting this as the controlling purpose, the court conceived that it would be served by allowing the discount to both American and treaty vessels. Their interpretation accordingly is dependent upon a showing of some substantial benefit to American ships to result from the act as so construed. Making only such concessions as are necessary for the sake of argument, let us test the court's position by its practical results.

It is submitted that so far from serving the purpose suggested, this construction would make of the subsection not merely a confirmation, but an accentuation of the old policy of reciprocity which had worked such disaster to American shipping; that there is no field in which by the present allowance of the discount to both domestic and treaty vessels any substantial advantage to the former can accrue; that a statute so operating would lead to absurd consequences such as Congress could not have intended; and that other sections of the act place a distinct and compelling negative on such an interpretation.

To grant the discount to goods in American and treaty bottoms alike would result in no substantial benefit to the former but would be a virtual donation to shippers in the latter and a wholly useless sacrifice of revenue.

Statistics show that the discount certainly accruing to goods imported in treaty vessels many times exceeds the possible discount upon all other shipments for which American vessels might even compete. The startling disproportion between this certain bounty to foreign shipping and the benefits, remote and problematical at best, to domestic bottoms is sufficient of itself to show that the court below did not correctly read the statute.

In opening this brief, attention was called to the existence of sundry statutes, executive proclamations and orders, by which the policy of shipping reciprocity embodied in the treaties had been gradually extended to the vessels of the world. These statutes and proclamations we shall shortly consider further. It suffices at present to say that, until repealed, either expressly or by implication, they extend to vessels of nontreaty nations the same favorable consideration guaranteed to others by the treaties, and lend color to the claim that the discount, if granted to any vessel, must be granted to all. This of course would make the discount absolutely coextensive with the duties, and amount to a horizontal reduction of 5 per cent on the rates of all dutiable imports. But putting this contention to one side, let us contrast the results within and without the field of express treaties. We shall find them little less startling.

For the year ending June 30, 1914, the total imports into the United States were $1,893,925,657. (Com. and Nav. for 1914, p. xiii.)[1] Of this, $156,-

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[1] Page references are to Commerce and Navigation of the United States, 1914. H. R. Doc. 1670, 63d Cong., 3d session. See R. S. 336; act Feb. 14, 1903, 32 Stat. 825, 826–827, sec. 4; H. R. Doc. 1329, 63d Cong., 3d sess., p. 17.

217,004 was brought overland (Com. & Nav., *supra*, p. 299), leaving a total of $1,737,708,653 imported by sea.

The value of the imports by American steam vessels was $193,424,634 (p. 299). The value of imports by vessels of the treaty nations of Austria-Hungary, Belgium, Great Britain,[1] France,[2] Germany, Italy, Japan, Netherlands, and Norway was $890,589,097 (pp. 298–300). Thus the total value of imports by American and treaty nation vessels entitled to the 5 per cent discount is $1,084,013,731.

The total of imports in vessels for the year 1914 unprotected by treaty which would not be entitled to the 5 per cent discount, on the other hand, was $653,694,922, ascertained by subtracting the total entitled to discount, or $1,084,013,731, from the total imports in vessels, or $1,737,708,653. Of this amount $399,463,333 came in practically free of duty, as appears from the table below. Deducting the total imports practically free in vessels not entitled by treaty to the discount ($399,463,333) from the total imports in vessels not protected by treaty

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[1] The figures of British imports include only goods brought in British vessels from the United Kingdom in Europe. (Com. and Nav., 1914, p. 298.)

[2] The French figures include only goods brought in French vessels from France, p. 298. The majority of the Court of Customs Appeals held that the treaty with France did not protect French goods against discrimination (R. 64, 65). As to this, see footnote, *ante*, p. 7.

($653,694,922), we have $254,231,589 as the total value of imports the routing of which by any possibility was subject to be diverted by a grant of 5 per cent discount to the carrying vessel.[1]

The average *ad valorem* rate on the total imports for the year ending June 30, 1914, was 14.88 per cent (p. xi, Table I). The duties therefore on imports entitled to the 5 per cent discount would have been 14.88 per cent of $1,084,013,731, or $161,301,243, and 5 per cent of this amount is $8,065,062. On the other hand, the duties on the total which might by possibility, remote or otherwise, be diverted to American bottoms ($254,231,589), at the average *ad valorem* rate of 14.88 per cent, would be $37,829,660, of which 5 per cent is $1,891,483.

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[1] This value of $254,231,589, embracing the total competitive field of duty paying imports, provides no deductions for importations in Spanish, Swedish, Argentinian, Chinese, Danish, Grecian, and vessels of many other treaty nations, although these carry the larger portion of the imports amounting to $47,484,340 described under the heading "all other," in Com. and Nav., 1914, pp. 299, 300, 878; nor millions of dollars of free imports from relatively unimportant countries; nor several millions of imports in sailing vessels of the treaty nations (p. 300); nor does it take into account the free importation of sugar after March 1, 1916, 38 Stat. 114, 131, sugar to the value of $98,394,782 having been imported from Cuba in 1914, on which duties were paid (p. 255). The tables make no pretense to absolute accuracy but only estimate reasonable results.

We restate this calculation in tabular form:

Results of allowance of discount to United States and treaty-nation bottoms on basis of imports and duties collected for year ending June 30, 1914.

Total imports (p. xiii, Com. and Nav. U. S., 1914)		$1, 893, 925, 657
Brought on cars and other land vehicles (p. 299)		156, 217, 004
Total imports in vessels		1, 737, 708, 653
Steam vessels:		
American (p. 299)	$193, 424, 634	
Austrian (p. 299)	24, 358, 126	
Belgian (p. 299)	35, 461, 566	
Dutch (p. 299)	68, 779, 035	
German (p. 299)	241, 318, 841	
Italian (p. 299)	34, 666, 994	
Japanese (p. 299)	55, 305, 703	
Norwegian (p. 300)	66, 440, 187	
British (p. 298) (goods direct from Great Britain)	271, 320, 331	
French (p. 298) (goods from France)	92, 938, 314	
Total imports in American and treaty bottoms entitled to discount		1, 084, 013, 731
Not clearly entitled to 5 per cent discount		653, 694, 922

The following imports in British vessels in the indirect trade were almost entirely on the free list:

		(p. xiv) % free.
South America (pp. 296–9):		
Argentine	$44, 515, 151	96. 75
Brazil	89, 592, 176	98. 85
Chile	22, 883, 620	97. 91
Colombia	3, 019, 960	91. 22
Peru	1, 573, 059	94. 47
Uruguay	7, 489, 234	99. 44
Russia	4, 956, 271	98. 38
Mexico	20, 203, 901	90. 38
China	24, 340, 527	81. 28
British India	48, 738, 686	78. 20
Straits Settlements	22, 654, 389	96. 33
Other British East India	8, 846, 236	91. 86
Japan	42, 983, 785	78. 70
Australia and Tasmania	12, 147, 907	94. 06
New Zealand	5, 104, 825	91. 61
Philippines	12, 660, 349	99. 93

Egypt	$12,867,635	97.06	
Trinidad and Tobago	6,489,148	97.38	
Jamaica	2,679,798	95.86	
Costa Rica	2,167,635	99.87	
Guatemala	1,361,557	99.01	
Panama	2,185,494	99.35	
			$309,463,333

Total imports, the transportation of some portion of which might by possibility be diverted to United States bottoms by the 5 per cent discount	$254,231,589
Total imports, United States and treaty bottoms (*supra*)	$1,084,018,731
Average *ad valorem* rate (p. xi) per cent	14.88
Total duties at average rate on imports in United States and treaty bottoms	$161,301,248
Discount on same at 5 per cent	$8,065,062
Total imports in competitive field	$254,231,589
Average *ad valorem* rate per cent	14.88
Total duties thereon	$37,829,660
Discount on same at 5 per cent	$1,891,483
Total reduction of revenues and donation for one year to existing United States and treaty ships	$8,065,062
Total possible benefit to goods in American bottoms by diverting all imports in the competitive field not clearly allowed discount	$1,891,483

A similar table for the year ending June 30, 1913, follows. It shows that the 1914 table, which covers nine months' actual operation of the 1913 tariff, is fairly representative. The average *ad valorem* rate of duties for 1912–13 was 17.69 per cent. Com. and Nav., 1914, Table I. To use this per cent instead of 14.88 per cent, the 1913–14 rate, would increase considerably the amount of duties, and consequently the sum which would be paid to treaty-nation bottoms. The average *ad valorem* rate under th tariff of 1913 was lower than that of the previous tariff, as represented by the statistics for the year ending June 30, 1914, by about 3 per cent. But since Congress must be deemed to have considered the effect of the 5 per cent discount in relation to the duties imposed by the 1913 tariff act, it seems fairer to use the lower average *ad valorem* rate of the new act. For similar considerations the per cent of imports on the free list from nontreaty nations is taken from the 1914 figures. The rates thus are estimated as nearly as possible under the new act, and the 1913 statistics, which Congress had before it, serve as a basis by furnishing the total import values. (The page references in this table are to Commerce and Navigation of the United States, 1913.)

Results of allowance of discount to United States and treaty-nation bottoms on basis of imports and duties collected for year ending June 30, 1913.

Total imports (p. 340, Com. and Nav. U. S., 1913)		**$1,813,008,234**
Brought in cars and other land vehicles (p. 336)		**115,346,125**
Total imports in vessels		**1,697,662,109**
Steam vessels:		
American (p. 336)	**$185,046,549**	
Austrian (p. 336)	**22,939,478**	
Belgian (p. 336)	**33,606,852**	
Dutch (p. 336)	**68,542,942**	
German (p. 336)	**223,228,085**	
Italian (p. 336)	**26,736,263**	
Japanese (p. 336)	**57,585,628**	
Norwegian (p. 338)	**44,854,507**	
British (p. 307) (goods direct from Great Britain)	**275,877,428**	
French (p. 307) (goods from France)	**87,961,934**	
Total imports in American and treaty bottoms		**1,026,374,756**
Not clearly entitled to 5 per cent discount		**671,287,353**

The following imports in British vessels almost entirely on the free list from the same nations included in 1914 table, *supra* (p. 307):

South America:		
Argentine	$24, 759, 312	
Brazil	115, 698, 422	
Chile	23, 412, 450	
Colombia	2, 894, 763	
Peru	1, 347, 262	
Uruguay	2, 347, 984	
Russia	8, 563, 120	
Mexico	12, 684, 341	
China	24, 911, 219	
British India	46, 800, 836	
Straits Settlements	30, 369, 887	
Other British East Indies	9, 622, 726	
Japan	27, 872, 009	
Australia and Tasmania	9, 876, 287	
New Zealand	4, 340, 256	
Philippines	15, 794, 403	
Egypt	19, 668, 070	
Trinidad and Tobago	4, 157, 437	
Jamaica	2, 169, 899	
Costa Rica	2, 137, 144	
Guatemala	423, 777	
Panama	1, 589, 859	
		$391, 441, 463

Total imports, the transportation of which might by possibility be diverted to United States bottoms by the 5 per cent discount	279, 845, 890
Total imports, United States and treaty bottoms (*supra*)	$1, 026, 374, 756
Average *ad valorem* rate per cent	14. 88
Total duties on imports in United States and treaty bottoms	$152, 724, 563
Discount on same at 5 per cent	$7, 636, 228
Total imports in competitive field	$279, 845, 890
Average *ad valorem* rate per cent	14. 88
Duties thereon	$41, 641, 068
Discount on same at 5 per cent	$2, 082, 053
Total reduction of revenues and donations to existing United States and treaty ships	$7, 636, 228
Total possible benefit to goods in American bottoms by diverting all imports in the competitive field not clearly allowed discount	$2, 082, 053

Only the most robust optimist, however, could believe that this 5 per cent discount would enable American vessels to monopolize the gross total of imports in the competitive field. Such a result is manifestly impossible. The ratio, therefore, between the benefits derived by shippers in American as compared with shippers in foreign vessels must certainly be greater than that between the competitive and the protected fields. As stated by De Vries, J., in his dissenting opinion (R. 121):

> While it is true, as shown by the majority opinion, that owing to the great number of uncertain and indeterminable factors, it is impossible to accurately estimate the relative amount of. tonnage carried in American as compared with foreign treaty vessels that would receive the benefits of this law, as construed by the majority opinion, there is sufficient of certain factors to disclose that at least *twelve times more benefits* would accrue to foreign than to American ships, and that really all the great maritime nations of the world would share therein equally with our merchant marine.

There is no exaggeration in this statement.

A discrimination against nontreaty ships alone is not a discrimination in favor of American vessels.

The most important countries with which we have no treaties reciprocally forbidding discriminating duties are Brazil, Bulgaria, Chile, Mexico, Nicaragua, Portugal, Roumania, Russia, Uruguay, Venezuela, and Switzerland. The effect of granting a 5 per cent discount to American ships and also to ships of treaty nations is of course to discriminate against the ships of these nontreaty countries (if perchance there are any), but it is not a discrimination which favors American ships.

The object of a discriminatory duty, be it noted, is not primarily to increase the amount of our overseas commerce, but to obtain, at the expense of those to whom we now pay freights, a relatively higher proportion of the total shipping coming to our shores. It is not designed to increase the total imports into the United States. That is determined by other factors. The purpose is that American boats shall carry a higher percentage of the total goods transported to our shores, and the nations now carrying the higher percentages shall carry relatively less.

A bounty extended alike to ships of the United States and to those of Great Britain, Germany, Austria-Hungary, Holland, Belgium, France, Italy, Norway, Sweden, Denmark, Japan, and other great commercial and maritime rivals can not be considered a discrimination *in favor* of the United States. For example, if a shipment were contemplated from Russia to the United States the 5 per cent discount granted to American vessels and to vessels of the great commercial nations might tend to prevent the vessels of Brazil, Bulgaria, Chile, Mexico, Nicaragua, Portugal, Roumania, Switzerland, Uruguay, Venezuela, and Russia itself from obtaining the shipment, but it would not aid the vessels of the United States to secure it. They could offer nothing which their more numerous rivals could not. The same considerations would apply to every port on the globe, for in the main the treaty provisions guarantee against discrimination based on the flag of the carrying vessel and not the port at which it is loaded. Thus the advantages of cheaper ships and cheaper labor which foreign nations now have, and which no doubt are in part at least responsible for their present prominence in our carrying trade, would continue to operate in favor of the foreign countries as against the United States, and would be simply reinforced, not counterbalanced, by the discount.

In the race for commercial supremacy a handicap of equal distance to the United States and to its better equipped commercial rivals simply operates to maintain the natural economic advantages of these competitors.

Again, if we grant the discount to American and treaty vessels alike we do not, of course, afford to American vessels the slightest advantage in trade with the treaty countries. It is to be expected, for instance, that citizens of Holland, shipping from Dutch ports, would prefer, all things being equal, Dutch to American vessels. The conduct of a German shipping from a German port, a Briton from a British, or a Frenchman from a French, would no doubt be the same.

The field, therefore, in which American and treaty vessels might compete must naturally be the trade from the widely scattered nontreaty countries. Here again American and treaty vessels are on equal terms in the matter of duties, though both are to enjoy an advantage in this respect over nontreaty vessels; but it is precisely in this field that a reduction of the rates of duty offers least attraction to shippers, for the reason that *the imports from the leading nations with which we have no such treatries are almost entirely on the free list.*

The imports from South America for the year ending June 30, 1914, amounted to $222,677,075, of which 97.33 per cent were free. Com. and Nav., 1914, Table IV, p. xiv. From the same table it appears that the imports from Brazil alone were $101,329,073, of which 98.85 per cent were free; that of the imports from Russia in Europe amounting to $20,831,184, 88.38 per cent were free; from Mexico, of the total of $92,690,566, 90.38 per cent were free; that of the total from Asia, $286,952,486, 77.57 per cent were free; of the $42,144,398 imports from Oceania 95.85 per cent were free. The imports from Europe, on the other hand, amounting to $895,602,868, were only 43.02 per cent free. It is evident that a 5 per cent discount on the duties of a very small proportion of the cargo of a liner, with a route from any or all of the nontreaty nations, must be an entirely insignificant and negligible favor, and that it could hasten in no way the growth of an American merchant marine.

There is evidence elsewhere in the act that Congress had no thought of singling out for discrimination British and French vessels in the indirect trade and ships of non-treaty countries.

It was said, nevertheless, by the court below that since there are certain vessels not protected by treaty, notably British vessels in the indirect trade, it must be assumed that the attention of Congress was centered upon them and that their mere existence furnishes an excuse for the subsection in question, since it affords some possibility, conceivable even if remote, of resultant benefit to the American marine.

Congress, however, has spoken to the contrary in no uncertain language. Other sections, not only of the same tariff act, but of the identical section and paragraph in which subsection 7 occurs, furnish intrinsic and conclusive evidence that Congress did not intend to make of these vessels a special target for its wrath.

Section IV, paragraph J, subsection 1, provides:

> That a discriminating duty of 10 per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, or merchandise which shall be imported in vessels not of the United States, or which being the production or manufacture of any foreign country not contiguous to the United States, shall come into the United States from such contiguous country; but this discriminating duty shall not apply to goods, wares, or merchandise which shall be imported in ves-

> sels not of the United States entitled at the time of such importation by treaty or convention or Act of Congress to be entered in the ports of the United States on payment of the same duties as shall then be payable on goods, wares, and merchandise imported in vessels of the United States, nor to such foreign products or manufactures as shall be imported from such contiguous countries in the usual course of strictly retail trade.

This discrimination, with the attendant exemption to vessels entitled by treaty or act of Congress to enter upon payment of the same duties as American vessels, has been incorporated from time to time, with trifling modifications, in the several tariff acts since the policy of reciprocal immunity from discriminating duties was inaugurated.[1]

The exemption covers, in addition to vessels protected " by treaty or convention," those which by " acts of Congress" are entitled to enter their cargoes on payment of the same duties as on cargoes in American vessels. What, we ask, are the foreign vessels so entitled to exemption from discriminating duties by acts of Congress? Precisely the vessels of those nations not entitled thereto "by treaty or convention." The acts of Congress referred to are those by which the policy of shipping reciprocity has been made effective as to each and all of those nations with which no reciprocal shipping treaties exist.

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[1] See act April 27, 1816, 3 Stat. 313, sec. 3; act April 20, 1818, 3 Stat. 459, sec. 2; act May 22, 1824, 4 Stat. 29; act July 14, 1832, 4 Stat. 592, sec. 10; act Aug. 30, 1842, 5 Stat. 561, sec. 11; act June 30, 1864, 13 Stat. 215, sec. 17; R. S., sec. 2502; act March 3, 1883, 22 Stat. 491, sec. 6; act Oct. 1, 1890, 26 Stat. 616, sec. 17; act Aug. 27, 1894, 28 Stat. 550, sec. 14; act Aug. 5, 1909, 36 Stat. 87, sec. 15.

Attention has heretofore been called to the acts of March 3, 1815, 3 Stat. 224, c. 77, January 7, 1824, 4 Stat. 2, c. 4, and May 24, 1828, 4 Stat. 308, c. 111, and to Revised Statutes, section 4228,[1] which is of the same general character. *Ante,* p. 41. Under these statutes proclamations have from time to time been issued exempting vessels of sundry nations from discrimination. Such, for instance, was the circular issued by the Secretary of the Treasury (whose act was that of the President—*Wolsey* v. *Chapman*, 101 U. S. 755, 770; *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 469) on October 15, 1849, with reference to British vessels, which made the following declaration:

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[1] "Sec. 4228. Upon satisfactory proof being given to the President, by the government of any foreign nation, that no discriminating duties of tonnage or imposts are imposed or levied in the ports of such nation upon vessels wholly belonging to citizens of the United States, or upon the produce, manufactures, or merchandise imported in the same from the United States or from any foreign country, the President may issue his proclamation, declaring that the foreign discriminating duties of tonnage and impost within the United States are suspended and discontinued, so far as respects the vessel of such foreign nation, and the produce, manufactures, or merchandise imported into the United States from such foreign nation, or from any other foreign country; the suspension to take effect from the time of such notification being given to the President, and to continue so long as the reciprocal exemption of vessels, belonging to citizens of the United States, and their cargoes, shall be continued, and no longer."

> First. In consequence of the alterations of the British navigation laws, above referred to, British vessels, from British or other ports, will, under our existing laws, after the first day of January next, be allowed to enter our ports with cargoes of the growth, manufacture, or production of any part of the world.
>
> Second. Such vessels and their cargoes will be admitted, from and after the date before mentioned, on the same terms as to duties, imposts, and charges, as vessels of the United States and their cargoes.

See *Oldfield* v. *Marriott, supra,* p. 171. This circular of the Secretary has been acted upon and acquiesced in ever since, and no discriminating duties have been levied on any importations in any British vessels, whether in the direct or indirect trade, since January 1, 1850. T. D. 18915 (G. A. 4072), p. 184; Customs Regulations, 1857, Art. 912; 1874, Art. 273; 1884, Art. 257.

In addition to numerous proclamations and orders of like character, specific acts have from time to time been passed exempting the vessels of this or that nation from discriminatory treatment. To set forth at length these statutes and proclamations would unduly extend the argumentative portion of this brief. They are collated in Appendix "B." So all-embracing is the present number and scope of those now in force that collectors of the customs have been directed to collect the discriminating duties only when thereto specifically instructed, and the records of the Treasury Department show not a dollar collected under the discriminating provision of the tariff act of August 5, 1909, 36 Stat. 11, 87, c. 6, section 15, during the fiscal years 1910, 1911, 1912, and 1913; and not a dollar has been collected to date under this section IV, paragraph J, subsection 1, of the present tariff act. See *infra,* p. 109.

There is thus in subsection 1, paragraph J, positive evidence of the intent of Congress not to discriminate solely against British or French shipping in the indirect trade or against other foreign vessels unprotected by treaty. Congress might have determined with reason to abandon entirely the general policy of reciprocity and return to preferential treatment for American ships; but that in one and the same section and paragraph of the tariff act it should have expressly exempted from a discriminatory duty of 10 per cent all of the vessels named, and immediately thereafter should have arranged a preferential discount directed solely against the same ships, is inconceivable. It cannot have intended to blow hot and cold in this fashion.

Subsections 2 and 3 of the same section IV and paragraph J furnish additional evidence that Congress was not singling out the indirect carrying trade in foreign vessels for hostile action.[1] For after a general prohibition of the indirect carrying trade in foreign vessels there is a saving clause for all vessels of those nations which maintain no similar regulation against the United States.

The proviso which is enacted in the present tariff act as a separate subsection 3 was embodied in the original act of March 1, 1817, as a technical proviso, as follows:

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[1] Subsection 2. That no goods, wares, or merchandise, unless in cases provided for by treaty, shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production, or manufacture, or from which such goods, wares, or merchandise can only be, or most usually are, first shipped for transportation. All goods, wares, or merchandise imported contrary to this section, and the vessel wherein the same shall be imported, together with her cargo, tackle, apparel, and furniture, shall be forfeited to the United States; and such goods, wares, or merchandise, ship, or vessel, and cargo shall be liable to be seized, prosecuted, and condemned in like manner, and under the same regulations, restrictions, and provisions as have been heretofore established for the recovery, collection, distribution, and remission of forfeitures to the United States by the several revenue laws.

Subsection 3. That the preceding subsection shall not apply to vessels or goods, wares, or merchandise imported in vessels of a foreign nation which does not maintain a similar regulation against vessels of the United States.

See to the like effect act of March 1, 1817, 3 Stat. 351, sec. 1; R. S., secs. 2497, 2498; act Aug. 27, 1894, 28 Stat. 550, secs. 15, 16; act July 24, 1897, 30 Stat. 210, secs. 23, 24; act Aug. 5, 1909, 36 Stat. 87, secs. 16, 17.

> *Provided, nevertheless,* That this regulation shall not extend to the vessels of any foreign nation which has not adopted, and which shall not adopt, a similar regulation.

The very object of the proviso, as shown in *Oldfield* v. *Marriott, supra,* p. 168, was further to establish reciprocal immunity from discriminating duties in all foreign carrying trade, direct and indirect.

It is interesting to note in passing that the effect of the exemption clause on subsection 1, paragraph J, and of this subsection 3 on its preceding subsection 2, is in each case to destroy any present operative effect of the main clause. This result is exactly analogous to that produced by the proviso of subsection 7. The majority of the Court of Customs Appeals argued that subsection 7 by their construction would have sufficient operative effect, since the discrimination would operate upon the same quantity of imports as the discrimination in subsection 1. Their premise of fact is not true, for the former affects only dutiable articles, and the latter all imports, whether dutiable or free. Yet if the analogy between the two subsections is to be followed we find that as the discriminating duty of 10 per cent under section 1 is in no case collected, so, also, the discriminating discount in subsection 7 should in no case be allowed.

The discrimination, if directed solely against nontreaty vessels, could have been more clearly and effectively accomplished without sacrifice of revenue by modifying section IV, paragraph J, subsection 1, and adding 5 per cent to the discriminating duty of 10 per cent thereby imposed.

It follows as a corollary from what has just been said that if the sole design of subsection 7 were to give to both domestic and treaty bottoms a discount of 5 per cent, and to discriminate against nontreaty vessels alone, the purpose of Congress could and no doubt would have been attained more directly by merely adding the proposed 5 per cent to the 10 per cent named in subsection 1, with such modification of that subsection as to do away with the exemptions granted by act or proclamation to nontreaty vessels, and to repeal the statutes authorizing them. In such event the discrimination against nontreaty vessels would have been effective both as to goods otherwise dutiable and those upon the free list,—upon all importations, in short; whereas subsection 7 can operate only upon dutiable goods. See Customs Regulations, 1874, Art. 497; 1884, Art. 574; 1892, Art. 904; 1899, Art. 1434; 1908, Art. 1055; *Russell* v. *Williams,* 106 U. S. 623, 627. In this aspect of the matter subsection 7 was wholly unnecessary, and the same result could have been more effectively accomplished not only without loss but with increase of revenue.

After all, it must be remembered that the act we are concerned with is primarily one "to provide revenues for the Government," and section IV, paragraph J, subsection 7, is only a small portion thereof. As stated in the headnote to *Van Dyke* v. *Cordova Copper Co.*, 234 U. S. 188:

> Although words may be superfluous, if the statute be construed in accordance with the obvious intent of Congress, the courts should not, simply in order to make them effective, give them a meaning that is repugnant to the statute looked at as a whole, and destructive of its purpose.

Can it be imagined that the act under consideration was designed to effect a horizontal cut of 5 per cent in what is certainly by far the larger part of the revenues which the bill was to provide? The schedules of the tariff act were carefully prepared with a view to the amount of revenue necessary to carry on the functions of government. The bill as introduced by Mr. Underwood in the House was prepared after two years of study, thirty days of public hearings, and three months spent in its drafting. Cong. Rec., vol. 50, pt. 1, pp. 433, 434, 460, 566. A volume of statistical information was presented with the report of the Ways and Means Committee. Rept. No. 5, 63d Cong., 1st sess. (to accompany H. R. 3321). The exact needs of the Government for revenue were presented to the Congress. Cong. Rec., *id.*, pt. 1, p. 332; pt. 3, pp. 2373, 2553. It was estimated by Mr. Underwood that the income from tariff duties and income tax would leave " a surplus of revenue over expenditures of something over a million dollars."

If at the time the conference report was adopted it had been suggested that section IV, paragraph J, subsection 7, might reduce by more than $8,000,000 per annum the revenues otherwise to be derived; that this reduction would certainly inure far more to the benefit of foreign vessels than our own; that these foreign vessels so favored would be those of our chief maritime rivals; and that most of the tonnage for which, under the subsection, we could possibly compete on equal terms was already on the free list and therefore unaffected by the discount,—one may safely assume that the proposition would not have received a single vote in either House.

To borrow the language of Mr. Justice Harlan in *Texas & Pacific Railway* v. *Interstate Commerce Commission,* 162 U. S. 197, 254:

> * * * No one would expect such a bill to pass an American Congress. If not, we should declare that Congress ever [never] intended to produce such a result; especially, when the act it has passed does not absolutely require it to be so interpreted.

8. Since it is impossible to give to the act any application to existing circumstances, it must be declared void, or operative only upon future condition.

The doctrine that repugnant clauses in a statute are mutually destructive is certainly neither new nor startling. Not even legislative omnipotence can will contradictions at the same time. A very early illustration of this rule is found in *United*

States v. *Cantril,* 4 Cranch, 167, in which Mr. Chief Justice Marshall held void for repugnancy a statute which declared it a felony "if any person shall utter or publish, as true, any *false,* forged or counterfeited bill or note *issued by order of the president, directors and company of the bank of the United States, and signed by the president and countersigned by the cashier thereof,* with intention to defraud the said corporation," etc. The court made no effort at judicial amendment of the statute as enacted.

As remarked by Mr. Justice McLean in the case of *City of Mobile* v. *Eslava,* 16 Pet. 234, 247:

> A statute so badly drawn as to vest a right to the same property in hostile claimants, would in itself be a nullity.

The case of *In re Hendricks,* 60 Kans. 796, dealt with a statute which created a county court, and provided in one section for the appointment of a judge by the governor within twenty days from the date of the act, and in another section declared that the question of establishing the court should be left to the voters at the next general election, and if the vote be favorable that the governor should then appoint the judge. The court said (p. 806):

> We are aware of the rule which requires courts to endeavor to harmonize conflicting portions of a statute. We have diligently endeavored to observe the rule in this case, but can arrive at no comprehension of the legislative intent in the enactment of this

> measure. It must therefore be held inoperative and void because of the absolute contradiction between its principal provisions. However averse the courts are to such action, they have several times heretofore been compelled to take it. [Citing cases.]

In *Farmers' Bank* v. *Hale,* 59 N. Y. 53, a statute was considered which denounced a forfeiture of interest in twice the amount of excess over the statutory rate of interest paid for usury, and then provided:

> It is hereby declared that the true intent and meaning of this act is to place the banking associations organized and doing business as aforesaid, on an equality, in the particulars in this act referred to, with the National Banks organized under the act of Congress * * *.

National banks organized under the acts of Congress were subject to the statute against usury, which provided a forfeiture of the entire principal and interest. This statute, therefore, was declared to will irreconcilabilities, and hence to be inoperative.

A statute must fail when it lays down no standard capable of application. *International Harvester Co.* v. *Kentucky* 234 U. S. 216; *State* v. *West Side Street Ry. Co.,* 146 Mo. 155. The language of Mr. Chief Justice Ruffin in *Drake* v. *Drake,* 4 Devereux (N. C.), 110, 115, is axiomatic:

> Whether a statute be a public or a private one, if the terms in which it is couched be so

> vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible.

As the Supreme Court of the State of Alabama pithily remarks in *Standard Oil Co.* v. *State,* 178 Ala. 400, 403:

> * * * There is no *cy pres* doctrine in the interpretation of statutes.

The situation at bar may be illustrated with the help of *Ropes* v. *Clinch,* 8 Blatchf. 304. The tariff act considered in that case (act of Aug. 5, 1861, 12 Stat. 292, c. 45) imposed duties as follows: "On unmanufactured Russia hemp, forty dollars per ton; on Manila and other hemps of India, twenty-five dollars per ton." The treaty with Russia of 1832, cited in the case of *Taylor* v. *Morton, ante,* had not been denounced. The court held that the statute imposing a higher duty on Russian hemp than on Manila and India hemp annulled, *pro tanto,* the Russian treaty. If, by supposition, in framing this statute there had been added a proviso to the effect that nothing therein contained should be so construed as to abrogate or in any manner impair or affect existing treaties we should have had an open conflict between the express terms of the main clause and the proviso, which would have produced, as in the case at bar, a legislative equipoise.

There remains of course the alternate suggestion that while the act under consideration is inoperative at this time, circumstances may arise under which it will be effective. If in the future these conflicting treaties should be abrogated or repealed, or by diplomatic negotiations be supplemented or modified, the way would be open for goods in American vessels to receive the preferential discount of 5 per cent. The contingency may be remote, but it is none the less possible.

As the Merchant Marine Commission remarked in its report in reference to the negotiation of new treaties without an anti-discrimination clause—

> * * * This, manifestly, would be a difficult, though not an impossible undertaking (Cong. Rec., vol. 50, pt. 5, p. 4499).

In this aspect of the matter subsection 7 falls into the class of statutes upon condition, valid in themselves but inoperative *in praesenti*. Such was the statute discussed in *Dunlap* v. *United States*, 173 U. S. 65, directing a tax on alcohol to be refunded in compliance with certain regulations of the Secretary of the Treasury, which regulations were never made.

Another illustration is to be found in the so-called Canadian reciprocity act of July 26, 1911, 37 Stat. 4, c. 3, providing for a long free list, to become operative whenever the President of the United States should issue a proclamation—a condition which never transpired.

III.

IN NO EVENT MAY THE DISCOUNT BE ALLOWED ON GOODS ENTERED WITHOUT PAYMENT OF DUTY AND WAREHOUSED PRIOR TO OCTOBER 3, 1913, AND NOT WITHDRAWN UNTIL AFTER THAT DATE.

Assuming, for the purposes of argument, that the statute is operative and grants to goods in American vessels, or in American and treaty vessels alike, the discount of 5 per cent, there still remains the question as to the allowance of a discount on goods so imported prior to October 3, 1913.

Section IV, paragraph Q, of the tariff act of 1913, provides:

> That on and after the day when this Act shall go into effect all goods, wares, and merchandise previously imported for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act and to no other duty, upon the entry or withdrawal thereof. * * *

The words of section IV, paragraph J, subsection 7, may be repeated for convenience:

> That a discount of five per centum on all duties imposed by this act *shall be allowed* on such goods, wares, and merchandise as *shall be imported* in vessels admitted to registra-

> tion under the laws of the United States: ***Provided,*** That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation. [Italics ours.]

The Board of General Appraisers regarded the discount as granted only to those ships which imported goods after the tariff act went into effect (R. 35). The majority of the Court of Customs Appeals, on the contrary, considered that paragraph J, subsection 7, must be construed in connection with paragraph Q; that under the decisions goods are not to be regarded as completely imported until the warehouse delivery permits are issued; and consequently that the 5 per cent discount should be allowed on the warehoused goods (R. 70, 71).

1. The language of subsection 7 clearly refers to the future.

As was said by the Board of General Appraisers (R. 35):

> * * * We are of the opinion, however, that the benefit was intended to be extended only to those ships which *imported* goods under the law of 1913. It may be noted that the language of subsection 7 is that the discount shall be allowed on goods which "shall be imported," which implies a future importation.

Paragraph Q of section 4, tariff act of 1913, provides that goods in warehouse "shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof." As we read the statute subsection 7 does not *impose* a duty; it *grants a reduction* for certain considerations. The "duties imposed by this act" are such as are specifically enumerated in the first 386 paragraphs of the act.

2. The purpose to build up American shipping by discriminating duties is in no way furthered by a discount on shipments made prior to the taking effect of the act.

The history of subsection 7, as above set forth, clearly demonstrates that its sole purpose was to aid American shipping interests by offering an inducement to shippers of imported goods of a 5 per cent discount on condition that American bottoms be used. Shipments made prior to the date that the tariff act went into effect could not be influenced by the discount. It seems clear, therefore, that the discount was not intended to be offered on such shipments.

Indeed, instead of construing the act as allowing the discount on goods withdrawn from warehouses for consumption after October 3, 1913, although brought to our shores long before, it would be more in accord with reason to allow the discount only to such importations as were both begun and finished, started from the foreign shore and finished by payment of duty at our shores, after the date of enactment.[1] The discount is to be allowed on such goods as *shall be imported,* not on goods partially imported previous to October 3, 1913, the importation of which would be subsequently completed.

But it is unnecessary in these cases to contend that subsection 7 grants an allowance only on goods brought by vessels which *left* the foreign shores after October 3, 1913. And Congress apparently drew the line at the date of the enactment, granting the allowance to all future *arrivals.*

8. A tariff revenue law is to be prospectively construed.

In *United States* v. *Heth,* 3 Cranch, 399, there was discussed a statute which provided that—

> there shall * * * be allowed to the collectors * * * two and one-half per centum on all monies which shall be collected and received by them * * * for and on account of the duties arising on goods, wares and merchandise imported into the United States.

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[1] Thus, the tariff act of August 30, 1842, 5 Stat. 548, in force on the day of enactment, provided the usual 10 per cent additional duty on importations in foreign vessels not protected by treaty or acts of Congress, and a further additional 10 per cent on importations in foreign vessels from any port east of the Cape of Good Hope (sec. 11). Section 25 then provided: "*And be it further enacted,* That nothing in this act contained shall apply to goods shipped in a vessel bound to any port of the United States, actually having left her last port of lading eastward of the Cape of Good Hope or beyond Cape Horn prior to the first day of September, 1842; * * *."

It was claimed that "goods, wares and merchandise imported" referred to past transactions. The court held that the statute was meant to read "goods, wares, and merchandise which shall be imported." Mr. Justice Paterson said (p. 413):

> * * * Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.

The tariff act of 1894, section 1, construed in *United States* v. *Burr,* 159 U. S. 78, provided—

> That *on and after the first day of August,* eighteen hundred and ninety-four, unless otherwise specially provided for in this act, there shall be levied, collected, and paid," etc.

The act went into effect August 28, 1894. The merchandise in question was entered for consumption and delivered after August 1, 1894, and before August 28. The question was whether duties should be paid under the tariff act of 1890 or under the act of 1894. In favoring the latter construction, the court referred with approval to the quotation from *United States* v. *Heth, supra,* and continued (p. 83):

> * * * and * * * the usual course in tariff legislation has been, inasmuch as some time is necessary to enable importers and business men to act understandingly, to fix

> a future date at which the statutes are to become operative.
>
> * * * * *
>
> (p. 85) These considerations lead to the conclusion that the act ought not to be construed to operate retrospectively contrary to the general rule, and so as to turn what was intended to secure a period of time to enable business men to act understandingly under the new law into a source of confusion and mischief to the contrary.

In arriving at its conclusion that the words in the first section "that on and after the first day of August, eighteen hundred and ninety-four," should not be literally applied, the court was guided by the general presumption against retrospective legislation, especially in connection with tariff laws, by a consideration of the act as a whole and a reference to the legislative history in the House and the Senate. In *United States* v. *American Sugar Company,* 202 U. S. 563, 577, the court followed the case of *United States* v. *Burr, supra,* and quoted with approval the language given above.

4. Exemptions from taxation are to be strictly construed.

It must not be forgotten that subsection 7 is not a statute imposing, but one remitting a tax.

The discount thereby allowed is an exemption from the general rates of duty imposed in section I of the act. In order to qualify under the exemption a claimant must show a clear title. A doubt resolves the claim against him.

In *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, the court said (p. 146):

> These cases show the principle upon which is founded the rule that a claim for exemption from taxation must be clearly made out. Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power.

Undoubtedly paragraph Q is to be construed in connection with subsection 7 and any other relevant sections in determining who is entitled to the five per cent discount. Undoubtedly, also, the determination of the amount of duties to be paid must be made as of the time the duties are paid, and, in case of warehoused goods, when the withdrawal permits are issued. Subsection 7, however, makes it clear that one element in determining the amount of duties to be paid on particular goods imported is whether the goods have been brought in particular vessels to our shores subsequent to the passage of the act. It is just as much an element in determining the duties to be paid that the importation shall be made in a vessel arriving at our ports subsequent to October 3, 1913, as it is that the vessel be admitted to registration under the laws of the United States or of a treaty nation, or that the goods be subject to duties under the general terms of the act.

IV.

THE CASES OF CUBAN IMPORTATIONS PRESENT NO SEPARATE QUESTION.

In the court below and in the brief supporting the petition for the present writs of certiorari it was contended that in no event could the importations of Cuban tobacco and cigars in American vessels be allowed the discount, on the ground that the peculiar treaty with Cuba of December 11, 1902, 33 Stat. 2136, granting a preferential discount of 20 per cent on Cuban products, especially in view of section IV, paragraph 3, providing particularly for the Cuban treaty, was the full measure of rights and liabilities. Though many considerations support this position (*Faber* v. *United States,* 221 U. S. 649, 658), it is not desired to insist upon it at this time. It is therefore conceded for present purposes that if the 5 per cent discount be allowed at all it should be allowed on Cuban goods imported in American bottoms in addition to the 20 per cent preferential rate provided in the treaty.

CONCLUSION.

The judgments of the Court of Customs Appeals should be reversed, with directions to order a dismissal of all the cases.

JOHN W. DAVIS,
Solicitor General.

JANUARY, 1916.

APPENDIX "A."

Treaty clauses guaranteeing reciprocal immunity from duties discriminating against vessels.

ARGENTINE REPUBLIC, 1853.

Art. VI. 10 Stat. 1005, 1007; 1 Malloy, 20, 22.[1]

The same duties shall be paid, and the same drawbacks and bounties allowed, upon the importation or exportation of any article into or from the territories of the United States, or into or from the territories of the Argentine Confederation, whether such importation or exportation be made in vessels of the United States or in vessels of the Argentine Confederation.

AUSTRIA-HUNGARY, 1829.

Art. III. 8 Stat. 398, 399; 1 Malloy, 29, 30.

* * * And, reciprocally, all kind of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said states, may also be so imported in Austrian vessels, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name, or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

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[1] Reference is to compilation of treaties between the United States and other powers published in 1910 under the direction of the Committee on Foreign Relations, United States Senate. S. Doc. No. 357, 61st Cong., 2d sess.

Art. IV. Id.

To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles, are, to their full extent, applicable to Austrian vessels and their cargoes, arriving in the ports of the United States of America; and, reciprocally, to vessels of the said states, and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country.

BELGIUM, 1875.

Art. V. 19 Stat. 628, 630; 1 Malloy, 90, 91.

Objects of any kind soever introduced into the ports of either of the two states under the flag of the other, whatever may be their origin and from what country soever the importation thereof may have been made, shall not pay other or higher entrance duties, nor shall be subjected to other charges or restrictions than they would pay, or be subjected to, were they imported under the national flag.

* * * * *

Art. VII. Id.; id. 92.

All premiums, drawbacks or other favors of like nature, which may be allowed in the states of either of the contracting parties upon goods imported or exported in national vessels, shall be likewise and in the same manner, allowed upon goods imported directly from one of the two countries by its vessels into the other, or exported from one of the two countries by the vessels of the other to any destination whatsoever.

BOLIVIA, 1858.

Art. IV. 12 Stat. 1003, 1006; 1 Malloy, 113, 115.

All kinds of produce, manufactures, or merchandise, of any foreign country which can, from time to time, be lawfully imported into the United States in their own vessels, may be also imported in vessels of the Republic of Bolivia;

and no higher or other duties upon the tonnage of the vessel and her cargo shall be levied and collected, whether the importation be made in the vessels of the one country or of the other; and in like manner all kinds of produce, manufactures, and merchandise of any foreign country that can be, from time to time, lawfully imported into the Republic of Bolivia in its own vessels, whether in her ports upon the Pacific or her ports upon the tributaries of the Amazon or La Plata, may be also imported in vessels of the United States; and no higher or other duties upon the tonnage of the vessel and her cargo shall be levied or collected, whether the importation be made in vessels of the one country or of the other. * * *

CHINA, 1880.

(Continued by Treaty of 1903, Art. XVII, 33 Stat., pt. 2, 2208, 2215.)

Art. III. 22 Stat. 828, 829; 1 Malloy, 239, 240.

* * * * *

The United States hereby promise and agree that no other kind or higher rate of tonnage dues or duties for imports shall be imposed or levied in the ports of the United States upon vessels wholly belonging to the subjects of His Imperial Majesty and coming either directly or by way of any foreign port, from any of the ports of China which are open to foreign trade, to the ports of the United States; or returning therefrom either directly or by way of any foreign port, to any of the open ports of China; or upon the produce, manufactures or merchandise imported in the same from China or from any foreign country, than are imposed or levied on vessels of other nations which make no discrimination against the United States in tonnage dues or duties on imports, exports, or coastwise trade; or than are imposed or levied on vessels and cargoes of citizens of the United States.

NEW GRANADA (COLOMBIA), 1846.

Art. IV. 9 Stat. 881, 882; 1 Malloy, 302, 303.

They likewise agree that whatever kind of produce, manufacture, or merchandise of any foreign country can be, from time to time, lawfully imported into the United States in their own vessels, may be also imported in vessels of the Republic of New Granada; and that no higher or other duties upon the tonnage of the vessel and her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other. * * *

Art. VI. Id. 884; id. 304.

In order to prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the three preceding articles are to their full extent applicable to the vessels of the United States and their cargoes arriving in the ports of New Granada, and reciprocally to the vessels of the said Republic of New Granada and their cargoes arriving in the ports of the United States, whether they proceed from the ports of the country to which they respectively belong, or from the ports of any other foreign country; and in either case, no discriminating duty shall be imposed or collected in the ports of either country on said vessels or their cargoes, whether the same shall be of native or foreign produce or manufacture.

COREA (KOREA), 1882.

Art. V. 23 Stat. 720, 722; 1 Malloy, 334, 336.

Merchants and merchant-vessels of Chosen visiting the United States for purposes of traffic, shall pay duties and tonnage-dues and all fees according to the Customs-Regulations of the United States, but no higher or other rates of duties and tonnage-dues shall be exacted of them, than are levied upon citizens of the United States or upon citizens or subjects of the most favored nation.

Merchants and merchant-vessels of the United States visiting Chosen for purposes of traffic, shall pay duties upon all merchandise imported and exported. The authority to levy duties is of right vested in the Government of Chosen. The tariff of duties upon exports and imports, together with the Customs-Regulations for the prevention of smuggling and other irregularities, will be fixed by the authorities of Chosen and communicated to the proper officials of the United States, to be by the latter notified to their citizens and duly observed.

It is however agreed in the first instance as a general measure, that the tariff upon such imports as are articles of daily use shall not exceed an ad valorem duty of ten per centum; that the tariff upon such imports as are luxuries, as for instance foreign wines, foreign tobacco, clocks and watches, shall not exceed an ad valorem duty of thirty per centum, and that native produce exported shall pay a duty not to exceed five per centum ad valorem. And it is further agreed that the duty upon foreign imports shall be paid once for all at the port of entry, and that no other dues, duties, fees, taxes or charges of any sort shall be levied upon such imports either in the interior of Chosen or at the ports.

United States merchant-vessels entering the ports of Chosen shall pay tonnage dues at the rate of five mace per ton, payable once in three months on each vessel, according to the Chinese calendar.

COSTA RICA, 1851.

Art. VI. 10 Stat. 916, 919; 1 Malloy, 341, 343.

* * * the same duties shall be paid on the importation into the territories of the United States of any article, being the growth, produce, or manufacture of the Republic of Costa Rica, whether such importation shall be made in United States or in Costa Rican vessels.

* * * * *

DENMARK, 1826.

Art. III. 8 Stat. 340; 11 Stat. 719, 720; 1 Malloy, 373, 374.

They, likewise, agree that whatever kind of produce, manufacture or merchandise, of any foreign country, can be, from time to time, lawfully imported into the United States, in vessels belonging wholly to the citizens thereof, may be also imported in vessels wholly belonging to the subjects of Denmark; and that no higher or other duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other. * * *

Art. IV. Id. 341; id.

No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of the dominions of His Majesty the King of Denmark; and no higher or other duties shall be imposed on the importation into the said dominions of any article, the produce or manufacture of the United States, than or shall be payable on the like articles, being the produce or manufacture of any other foreign country. Nor shall any higher or other duties or charges be imposed in either of the two countries on the exportation of any articles to the United States, or to the dominions of His Majesty the King of Denmark, respectively, than such as are or may be payable on the exportation of the like articles to any other foreign country.

FRANCE, 1822.

Art. I. 8 Stat. 278; 1 Malloy, 521.

Articles of the growth, produce or manufacture, of the United States, imported into France in vessels of the United States, shall pay an additional duty, not exceeding twenty francs per ton of merchandise, over and above the duties paid on the like articles, also of the growth, produce or manufacture, of the United States, when imported in French vessels.

Art. II. Id.

Articles of the growth, produce or manufacture, of France, imported into the United States in French vessels, shall pay an additional duty, not exceeding three dollars and seventy-five cents per ton of merchandise, over and above the duties collected upon the like articles, also of the growth, produce or manufacture of France, when imported in vessels of the United States.

Art. VII. Id. 280; id. 522.

The present temporary convention shall be in force for two years from the first day of October next, and even after the expiration of that term, until the conclusion of a definitive treaty, or until one of the parties shall have declared its intention to renounce it; which declaration shall be made at least six months before hand.

And in case the present arrangement should remain without such declaration of its discontinuance by either party, the extra duties specified in the 1st and 2d articles, shall, from the expiration of the said two years, be, on both sides, diminished by one-fourth of their whole amount, and, afterwards by one-fourth of the said amount from year to year, so long as neither party shall have declared the intention of renouncing it as above stated.

GREAT BRITAIN, 1815.

(Indefinitely extended by commercial Convention of 1827, Art. I, 8 Stat. 361.)

Art. II. 8 Stat. 228; 1 Malloy, 624, 625.

No higher or other duties shall be imposed on the importation into the United States of any articles, the growth, produce, or manufacture, of his Britannick majesty's territories in Europe, and no higher or other duties shall be imposed on the importation into the territories of his Britannick majesty in Europe of any articles, the growth, produce, or manufacture, of the United States, than are or shall be payable on the like articles being the growth, produce, or manufacture, of any other foreign country; nor shall any higher or other duties or charges be imposed in either of the two countries, on the exportation of any articles to the United States, or to his Britannick majesty's territories in Europe, respectively, than such as are payable on the exportation of the like articles to any other foreign country; nor shall any prohibition be imposed on the exportation or importation of any articles, the growth, produce, or manufacture, of the United States, or of his Britannick majesty's territories in Europe, to or from the said territories of his Britannick majesty in Europe, or to or from the said United States, which shall not equally extend to all other nations.

No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels, than those payable in the same ports by vessels of the United States; nor in the ports of any of his Britannick majesty's territories in Europe on the vessels of the United States, than shall be payable in the same ports on British vessels.

The same duties shall be paid on the importation into the United States, of any articles, the growth, produce, or manufacture, of his Britannick majesty's territories in Europe, whether such importation shall be in vessels of the United States or in British vessels, and the same duties shall be paid on the importation into the ports of any of his Brittannick majesty's territories in Europe, of any article, the growth, produce, or manufacture, of the United States, whether such importation shall be in British vessels or in vessels of the United States.

* * * * *

GREECE, 1837.

Art III. 8 Stat. 498, 500; 1 Malloy, 848, 849.

All that may be lawfully imported into the United States of America, in vessels of the said States, may also be thereinto imported in Greek vessels, from whatever place they may come, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name, or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if imported in national vessels.

* * * * *

Art. IX. Id. 502; id. 850.

All privileges of transit, and all bounties and drawbacks which may be allowed within the territories of one of the high contracting parties, upon the importation or exportation of any article whatsoever, shall likewise be allowed on the articles of like nature, the products of the soil, or industry of the other contracting party, and on the importations and exportations made in its vessels.

HANSEATIC REPUBLICS, 1827.

Art. I. 8 Stat. 366; 1 Malloy, 901.

The contracting parties agree, that whatever kind of produce, manufacture, or merchandise of any foreign country can be, from time to time, lawfully imported into the

United States in their own vessels, may be also imported in vessels of the said Free Hanseatic Republics of Lubec, Bremen, and Hamburg; and that no higher or other duties upon the tonnage or cargo of the vessel shall be levied or collected, whether the importation be made in vessels of the United States, or of either of the said Hanseatic Republics. * * *

Art. III. Id. 308; id. 902.

No priority or preference shall be given, directly or indirectly, by any or either of the contracting parties, nor by any company, corporation, or agent, acting on their behalf, or under their authority, in the purchase of any article, the growth, produce, or manufacture of their States, respectively, imported into the other, on account of, or in reference to, the character of the vessel, whether it be of the one party or of the other, in which such article was imported; it being the true intent and meaning of the contracting parties that no distinction or difference whatever shall be made in this respect.

HONDURAS, 1864.

Art. VI. 13 Stat. 699, 702; 1 Malloy, 952, 954.

The same duties shall be paid on the importation into the territories of the Republic of Honduras of any article being of the growth, produce, or manufacture of the territories of the United States, whether such importation shall be made in vessels of Honduras or of the United States; and the same duties shall be paid on the importation into the territories of the United States of any article being the growth, produce, or manufacture of the Republic of Honduras, whether such importation shall be made in the United States or in Honduras vessels.

* * * * *

ITALY, 1871.

Art. I. 17 Stat. 845; 1 Malloy, 969, 970.

There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation.

Italian citizens in the United States, and citizens of the United States in Italy, shall mutually have liberty to enter with their ships and cargoes all the ports of the United States and of Italy, respectively, which may be open to foreign commerce. They shall also have liberty to sojourn and reside in all parts whatever of said territories. They shall enjoy, respectively, within the states and possessions of each party, the same rights, privileges, favors, immunities, and exemptions for their commerce and navigation as the natives of the country wherein they reside, without paying other or higher duties or charges than are paid by the natives, on condition of their submitting to the laws and ordinances there prevailing.

* * * * *

Art. V. Id. 847; id. 971.

The high contracting parties agree that whatever kind of produce, manufactures, or merchandise of any foreign country can be from time to time lawfully imported into the United States, in their own vessels, may be also imported in Italian vessels; that no other or higher duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other; * * *.

JAPAN, 1911.

Art. VIII. 37 Stat., pt. 2, 1504, 1506; Charles, 79, 80.

All articles which are or may be legally imported into the ports of either High Contracting Party from foreign countries in national vessels may likewise be imported into those ports in vessels of the other Contracting Party, without being liable to any other or higher duties or charges of whatever denomination than if such articles were imported in national vessels. Such reciprocal equality of treatment shall take effect without distinction, whether such articles come directly from the place of origin or from any other foreign place.

* * * * *

LIBERIA, 1862.

Art. III. 12 Stat. 1245; 1 Malloy, 1050, 1051.

* * * no tonnage, import, or other duties or charges shall be levied in the United States of America and their territories on the vessels of the Republic of Liberia, or on goods imported or exported in those vessels, beyond what are or may be levied on national vessels, or on the like goods imported or exported in national vessels.

MECKLENBURG-SCHWERIN, 1847.

Art. I. 9 Stat. 910, 911; 1 Malloy, 1074, 1075.

The high contracting parties agree that whatever kind of produce, manufacture, or merchandise of any foreign country can be, from time to time, lawfully imported into the United States in their own vessels, may also be imported in the vessels of the Grand Duchy of Mecklenburg-Schwerin, and no higher or other duties upon the tonnage or cargo of the vessel shall be levied or collected, whether the importation be made in a vessel of the United States, or in a vessel of Mecklenburg-Schwerin.

* * * * *

NETHERLANDS, 1852.

Art. I. 10 Stat. 982; 2 Malloy, 1248.

Goods and merchandise, whatever their origin may be, imported into or exported from the ports of the United States, from and to any other country, in vessels of the Netherlands, shall pay no higher or other duties than shall be levied on the like goods and merchandise imported or exported in national vessels. Reciprocally, goods and merchandise, whatever their origin may be, imported into or exported from the ports of the Netherlands, from and to any other country, in vessels of the United States, shall pay no higher or other duties than shall be levied on the like goods and merchandise imported or exported in national vessels.

The bounties, drawbacks, and other privileges of this nature, which may be granted in the States of either of the contracting parties, on goods imported or exported in national vessels, shall also and in like manner be granted on goods imported or exported in vessels of the other country.

Art. II. Id. 983; id. 1249.

The above reciprocal equality in relation to the flags of the two countries is understood to extend also to the ports of the colonies and dominions of the Netherlands beyond the seas, in which goods and merchandise, whatever their origin may be, imported or exported from and to any other country in vessels of the United States, shall pay no higher or other duties than shall be levied on the like goods and merchandise imported or exported from and to the same places in vessels of the Netherlands. The bounties, drawbacks, or other privileges of similar denomination which may be there granted on goods and merchandise imported or exported in vessels of the Netherlands shall also, and in like manner, be granted on goods and merchandise imported or exported in vessels of the United States.

NORWAY, 1827.

Art. III. 8 Stat. 346, 348; 2 Malloy, 1748, 1750.

All that may be lawfully imported into the United States of America, in vessels of the said States, may also be thereinto imported in Swedish and Norwegian vessels, and in those of the island of St. Bartholomew, from whatever place they may come, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name, or to the profit, of the Government, the local authorities, or of any private establishments whatsoever, than if imported in national vessels.

* * * * *

Art. V. Id.

The stipulations contained in the three preceding articles, are to their full extent, applicable to the vessels of the United States of America, proceeding, either laden, or not laden, to the colony of St. Bartholomew, in the West Indies, whether from the ports of the kingdoms of Sweden and Norway, or from any other place whatsoever; or proceeding from the said colony, either laden or not laden, whether bound for Sweden or Norway, or for any other place whatsoever.

Art. X. Id. 350; id. 1751.

All privileges of transit, and all bounties and drawbacks which may be allowed within the territories of one of the high contracting parties, upon the importation or exportation of any article whatsoever, shall, likewise, be allowed on the articles of like nature, the products of the soil or industry of the other contracting party, and on the importations and exportations made in its vessels.

PARAGUAY, 1859.

Art. VI. 12 Stat. 1091, 1094; 2 Malloy, 1364, 1366.

The same duties shall be paid upon the importation and exportation of any article which is or may be legally importable or exportable into the dominions of the United State of America and into those of Paraguay, whether such importation or exportation be made in vessels of the United States of America or in Paraguayan vessels.

Art. VIII. Id.

Citizens of the United States of America shall pay, in territories of the Republic of Paraguay, the same import and export duties which are established or may be established hereafter for Paraguayan citizens. In the same manner the latter shall pay, in the United States of America, the duties which are established or may hereafter be established for citizens of the United States of America.

PRUSSIA, 1828.

Art. III. 8 Stat. 378; 2 Malloy, 1496, 1497.

* * * all kind of merchandise and articles of commerce, either the produce of the soil or of the industry of the kingdom of Prussia, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said States, may, also, be so imported in Prussian vessels, without paying other or higher duties or charges, of whatever kind or denomination, levied in

the name, or to the profit of the government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

Art. IV. Id. 380; id. 1497.

To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles, are, to their full extent, applicable to Prussian vessels, and their cargoes, arriving in the ports of the United States of America; and, reciprocally, to vessels of the said States and their cargoes, arriving in the ports of the Kingdom of Prussia, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country.

Art. VIII. Id. 382; id. 1498.

No priority or preference shall be given, directly or indirectly, by either of the contracting parties, nor by any company, corporation, or agent, acting on their behalf, or under their authority, in the purchase of any article of commerce, lawfully imported, on account of, or in reference to, the character of the vessel, whether it be of the one party, or of the other, in which such article was imported: it being the true intent and meaning of the contracting parties, that no distinction or difference, whatever shall be made in this respect.

SPAIN, 1902.

Art. VIII. 33 Stat., pt. 2, 2105, 2109; 2 Malloy, 1701, 1703.

All the articles which are or may be legally imported from foreign countries into ports of the United States, in United States' vessels, may likewise be imported into those ports in Spanish vessels, without being liable to any other or higher duties or charges whatsoever than if such articles were imported in United States vessels; * * *.

SWEDEN, 1827.

Arts. III and V. 8 Stat. 346; 2 Malloy, 1748, 1750.

Same as Norway, *supra.*

APPENDIX "B."

Statutes, proclamations, and orders providing for reciprocal immunity from discriminating duties.

Specific Statutes.

Belgium, 5 Stat. 152, Mar. 2, 1837, c. 19.
British colonial ports, 3 Stat. 740, Mar. 1, 1823, c. 22.
British West Indies and other islands, 4 Stat. 419, May 29, 1830, c. 207.
Colombia, 4 Stat. 154, Apr. 20, 1826, c. 26.
Colombia, 4 Stat. 515, May 19, 1832, c. 79.
France, from Martinique and Guadaloupe, 4 Stat. 269, May 9, 1828, c. 49.
France, from French Guiana, 5 Stat. 489, June 1, 1842, c. 32.
France, from Miquelon and St. Pierre, 5 Stat. 748, Mar. 3, 1845, c. 66.
Hanseatic Republics, 4 Stat. 2, Jan. 7, 1824, c. 4.
Hamburg and Bremen, 3 Stat. 510, Mar. 3, 1819, c. 75.
Netherlands, 3 Stat. 464, Apr. 20, 1818, c. 110.
Netherlands, 4 Stat. 2, Jan. 7, 1824, c. 4.
Norway, 4 Stat. 2, Jan. 7, 1824, c. 4.
Oldenburg and Prussia, 4 Stat. 2, Jan. 7, 1824, c. 4.
Portugal, 5 Stat. 125, July 4, 1836, c. 359.
Prussia, 3 Stat. 510, Mar. 3, 1819, c. 75.
Prussia, 4 Stat. 2, Jan. 7, 1824, c. 4.
Prussia, 4 Stat. 308, May 24, 1828, c. 111; R. S. secs. 4229, 4230.
Russia, 4 Stat. 2, Jan. 7, 1824, c. 4.
Sardinia, 4 Stat. 2, Jan. 7, 1824, c. 4.
Spain, 4 Stat. 578, July 13, 1832, c. 207.
Spain, 9 Stat. 236, May 31, 1848, c. 55.
Spain, 15 Stat. 282, Mar. 1, 1869, c. 54.
Sweden and Norway, 4 Stat. 206, Feb. 22, 1827, c. 21.

Certain of these, of course, are superseded by the later treaties.

General Acts.

The following are effective as to any nondiscriminating nation upon Executive proclamation:

Act of March 3, 1815, 3 Stat. 224, c. 77; direct trade.
Act of January 7, 1824, 4 Stat. 2, c. 4; direct trade.
Act of May 24, 1828, 4 Stat. 308, c. 111; direct and indirect trade.
Revised Statutes, section 4228.
Act of July 24, 1897, 30 Stat. 214, c. 13, amending section 4228, R. S., by extension to countries imposing partial discrimination.

The Dingley Tariff Act of July 24, 1897, 30 Stat. 151, 209, c. 11, exempted treaty vessels from the discriminating duty of 10 per cent but omitted from the exempting clause vessels theretofore entitled to immunity from discrimination under proclamations of the President (sec. 22). This, however, did not have the effect of repealing section 4228 of the Revised Statutes, under which the proclamations providing reciprocal immunity from discriminating duties were promulgated. 21 Opin. A. G., p. 597. The class of nontreaty vessels protected from discriminating duties under acts of Congress was again expressly exempted from the discriminating duty, together with treaty vessels, under the subsequent tariff acts of 1909 and 1913. Act of August 5, 1909, 36 Stat. 11, 87, c. 6, sec. 15; act of October 3, 1913, 38 Stat. 114, 192, 195, c. 16, sec. IV, par. J, subsec. 1.

Proclamations and Orders.

Austria, 4 Stat. 814, June 3, 1829.
Austria, 4 Stat. 816, May 11, 1829.
Brazil, 9 Stat. 1001, Nov. 4, 1847.
Bremen, 3 Stat. App. I, July 24, 1818.
British Islands and possessions, 4 Stat. 817, Oct. 5, 1830.
Chile, 9 Stat. 1004, Nov. 1, 1850.
China, 21 Stat. 800, Nov. 23, 1880.
Cuba, 32 Stat. 2013, July 3, 1902.
France, 16 Stat. 1127, June 12, 1869.
France, 16 Stat. 1130, Nov. 20, 1869.
France, 17 Stat. 957, Oct. 30, 1872.

France, 18 Stat. 844, Sept. 22, 1873.
France from Miquelon and St. Pierre, 9 Stat. 1001, Apr. 20, 1847.
Greece, 11 Stat. 783, June 14, 1837.
Hanover, 4 Stat. 815, July 1, 1828.
Hamburg, 3 Stat. App. I, Aug. 1, 1818.
Hawaiian Islands, 14 Stat. 819, Jan. 29, 1867.
Japan, 17 Stat. 956, Sept. 4, 1872.
Lubeck, 3 Stat. App. I, May 4, 1820.
Mecklenberg-Schwerin, 11 Stat. 781, Apr. 28, 1835.
Mexico, T. D. 20690, Feb. 11, 1899.
Nicaragua, 13 Stat. 739, Dec. 16, 1863.
Norway, 3 Stat. App. I, Aug. 20, 1821.
Oldenburg, 3 Stat. App. I, Nov. 22, 1821.
Oldenburg, 4 Stat. 814, Sept. 18, 1830.
Panama, 34 Stat. 3038, May 15, 1905.
Pope, 11 Stat. 768, June 7, 1827.
Pope, 11 Stat. 795, Feb. 25, 1858.
Portugal, 11 Stat. 784, Oct. 11, 1837.
Portugal, 16 Stat. 1137, Feb. 25, 1871.
Spain, except Cuba and Porto Rico, 17 Stat. 954, Dec. 19, 1871.
Spain, from Cuba and Porto Rico, 23 Stat. 835, Feb. 14, 1884.
Spain, from Cuba and Porto Rico, 24 Stat. 1028, Oct. 13, 1886.
Spain, 24 Stat. 1030, Oct. 27, 1886.
Spain, 25 Stat. 1482, Sept. 21, 1887.
Tuscany, 11 Stat. 782, Sept. 1, 1836.
Geat Britain, T. D. 18383, Sept. 25, 1897; Cus. Reg. 1857, art. 912; 1874, art. 273; 1884, art. 257.
Costa Rica, T. D. 13133, Aug. 23, 1892.

Customs Regulations of 1884 enumerate as exempt from discriminating duties vessels of the following nations (pp. 119 to 124):

Argentine Confederation,
Austria,
Belgium,
Bolivia,
Borneo,
Brazil,
Chili,
China,
Costa Rica (direct trade),
Denmark,
Dominican Republic,
Ecuador,
France,
German Empire,

Great Britain and her possessions.
Greece,
Guatemala,
Hayti,
Hanseatic Towns: Hamburg, Lubec, Bremen,
Hawaiian Islands,
Honduras,
Italy,
Japan,
Liberia,
Madagascar,
Mecklenburg-Schwerin,
Mexico,
Netherlands,
New Grenada, United States of Colombia,
Nicaragua,
Norway,
Oldenburg,
Orange Free State (direct trade),
Ottoman Empire,
Paraguay,
Persia (direct trade),
Peru,
Portugal,
Prussia,
Russia,
Sandwich Islands,
Salvador,
Serbia,
Spain, except Cuban and Porto Rican merchandise,
Sweden and Norway, including island of St. Bartholomew.

Collectors of customs were instructed on January 31, 1898, that "should any foreign merchandise become legally liable to the discriminating duty provided for by section 22, due notice will be given by this Department." T. D. 18900. See Customs Regulations of 1908, art. 1055, p. 434. No notice has been given under this regulation.

Customs Regulations of 1915, article 631, page 312, provide:

> The discriminating duties provided by subsection 1 of paragraph J of section 4 of the tariff act of October 3, 1913, as amended by the act of March 4, 1915, will be imposed only in pursuance of specific instructions issued and published from time to time by the Secretary of the Treasury.

No instructions thereunder have been issued to this date directing the imposition of the discriminating duty.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1915.

THE FIVE PER CENT. DISCOUNT CASES.	Nos. 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509.

BRIEF IN BEHALF OF IMPORTERS INTERESTED IN THE ABOVE MENTIONED ISSUE.

This brief is filed, with the Court's permission by Hatch & Clute, attorneys, in behalf of a number of clients interested in the five per cent. discount question. As a number of appeals will be briefed, we do not deem it necessary to elaborate this brief as fully as might be required otherwise. Accordingly, we desire to bring to the Court's attention, briefly only, such points as appear to us pertinent to the issue.

The whole question to whatever extent it may be elaborated begins and comes back again to the following language:

> "J. Subsection 7. That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares and merchan-

> dise as shall be imported in vessels admitted to registration under the laws of the United States: Provided, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The question presents three possibilities:

(1) Allow no discount;

(2) Allow it on goods imported in American vessels;

(3) Allow it on goods imported in American vessels, and in foreign vessels entitled by treaty.

The officers charged with the enforcement of the law adopted the first course. The Board of United States General Appraisers adopted the second. The Customs Court adopted the third.

To understand the matter better it may be well to recall briefly the orign of the subsection in question. In the bill that came from the House to the Senate there was the simple provision for a five per cent. discount on American vessels without any proviso.

But in the Senate inquiry was made as to the effect of such an allowance upon our treaties with other nations. It was quite natural that the Senate should raise this question, in view of the fact that the treaty-making power of our Government is vested in the President by and with the advice and consent of the Senate. The Senate feared that a conflict or dispute would arise with foreign nations by reason of existing treaties. For example, at page 4237 of the Congressional Record, 63d Congress, First Session, there was a communication from the President with enclosure, which indicated fear that the enactment of the clause would lead to international complications and diplomatic negotiations, on the ground that it would be a breach of our treaties to enact such a clause. It is also significant, as subsequent developments show, that Mr. Moore pointed out to the Senate, at this stage of the proceedings, that there would probably be no objection to the House proposal if the discount were extended to foreign vessels entitled thereto by treaty.

Again, at pages 4500 and 4501 of the Congressional Record, will be found further general fears expressed in the Senate of the result. At page 5345 of the record, in a letter from Mr. Polk to Senator Simmons, it is stated there would seem to be no question but that the result would be to violate the treaties. The Senate was also advised what nations would be affected by the proposed enactment, and what nations would not be so affected; also in the case of British ships the distinction between those bringing goods from Great Britain's Territories in Europe and from other parts of the world was pointed out. The reasons are obvious, therefore, which led the Senate Committee to propose to strike out of the Act, as it came from the House, Section J, Subsection 7 (see Congressional Record, p. 4494). This was done by the Senate, and the bill went to conference with that section struck out, but as a result of the conference, as shown at page 5311 of the record (Amendment 657), the subsection was restored, but with the proviso added. At page 5323 of the record, Senator Simmons, in offering a statement of the principal changes relating to the administrative sections, said:

> "The provisions allowing a discount of 5 per

> cent. on duties on goods imported in vessels of United States register are modified so as not to apply to nations having treaties providing for equal treatment of imports in vessels of both countries."

It seems plain, therefore, from a history of the enactment, that it was the earnest desire of the House to give a discount to importers of merchandise in American vessels, but that the Senate apprehended some treaties might be dishonored. Accordingly the Senate proposed to strike the subsection out, but in conference a compromise was reached, so that while on the one hand, importers by American vessels should have the discount as the House wanted, on the other our treaties should be observed as the Senate desired.

The Senate's apprehension would appear to have been well founded if the law had been enacted as proposed by the House, and the Executive Department had thereafter allowed the discount on American vessels and ignored treaty rights.

It would be natural, therefore, that the Senate as a matter of precaution to protect its views, should lay an injunction on the Executive Department that, in carrying out the law giving a discount to importers in American vessels, it should be done in such a manner as would not impair or affect the provisions of any treaty.

Since this whole question in the last analysis comes down to the proviso, and what Congress meant and intended by tacking it on to the enacting clause, a critical examination of the proviso would seem to be necessary to a correct conclusion. Naturally, the office or function of the word "provided" as used in the subsection, becomes of first importance. The word has three functions as used in Statutory Law as shown by the decisions:

(1) To carve an exception out of a preceding general provision;

Ex P: Lusk, 82 Ala., 519, 522.

(2) To state a condition upon which the happening of the preceding matter depends;

Forscht *v.* Green, 53 Pa., 138, 140.

(3) As an explanation to guard against a misinterpretation of the preceding matter.

Bastin *v.* Bidwell, 18 Ch. Div., 238, 244.
Minis *v.* U. S., 15 Pet., 423.

Which office of these three the word performs must be determined from the sense and meaning of the subject matter.

Boston Safe Deposit & Trust Co. *v.* Thomas, 59 Kan., 470, 472 and 473.
Carroll *v.* State, 58 Ala., 396, 401.

Our contention is that in the present case it was used *as an explanation to guard against a misinterpretation of the preceding matter.* Its origin demonstrates this and shows that the Legislative Department of the Government to avoid misconstruction being put upon its intent in enacting the discount provision, made it a part of the law, that the Executive Department in carrying it into practical effect, and the Judicial Department in construing it, should not so carry it into effect or so construe it as to impair any treaty. In order to give effect to the enacting clause and at the same time obey the injunction not to impair any treaty, leaves only one course of three suggested herein open, namely, to allow the discount to importers in American vessels and in vessels of nations entitled thereto by treaty. This would be in harmony with the suggestions of Professor Moore, and the object of the proviso as stated by Senator Simmons, not that these suggestions and statements control in arriving at the intent of Congress, but that they are cogent contemporary events aiding in a right solution of the question.

We come then to the position taken by the Attorney General, as disclosed in the Board's decision and followed by the Treasury Department, namely, that the 5 per cent. discount cannot be given to American vessels *only,* without impairing *the stipulations of existing treaties between the United States and other powers.* This is a most important statement, because the political department of our Government, charged with executing or withholding the benefits of treaties, and which power the decisions show, is not delegated to the judiciary, *admits that the treaties in question are in force* and entitled to recognition by the United States. It was a reiteration of the same statement made by the Executive Department to the Senate. If the Executive Department charged with that duty admits that they are in force, and that their benefits have not been withdrawn, then the position that the Courts cannot enforce a treaty on the ground that it is a political question for the Executive Department to decide whether the benefit shall be given or withheld, can have no application in this case where the record and the facts show that the Executive Department admits that the treaties are in force and have not been withdrawn, and should be observed, and that the discount cannot be given to American vessels *only*, without breaking said treaties.

We respectfully submit that under the Constitution such treaties are the supreme law of the land and will be enforced by this Court, and this particularly so in the present case inasmuch as the proviso *executed* the treaties and made the stipulations therein contained a rule of law both for the Executive and Judicial Departments of the Government.

The proviso was a statement in negative form of a declaration on the part of Congress that our treaties should be observed. In other words, the Legislative Department declared to the Executive and the Judicial that in carrying into effect the law that a discount of five per cent. should be allowed on goods in American vessels, it should be so done as not to impair any treaty, but on the other hand that full force and effect should be given to the stipulations contained in said treaty.

It has been said that these treaties were contracts addressing themselves to the legislative power. But conceding this point we assert that the legislative power took notice of them, arising out of the inquiries made in and the information furnished to the Senate, and by way of precaution (*ex industria*) enacted the proviso to safeguard those contracts by declaring that they should be respected. If the stipulations in the treaties imported a contract that the United States would treat the vessels of the parties equally, then Congress carried those stipulations out and confirmed them by declaring that in allowing the discount to American vessels those stipulations should not be impaired.

We submit there is only one way that the law as enacted by Congress to allow a discount on American vessels, but not to impair any treaty, can be observed, and that is to give the discount to American vessels, and to foreign nations so entitled by treaty.

We do not understand that the Courts inquire into the expediency of laws, as that is a legislative question and not a judicial one, but inasmuch as the Solicitor General argues, on ground of expediency, that giving the discount to foreign vessels practically nullifies the benefit to American vessels, we wish to point out for example, that the treaty with Great Britain only gives equal treatment to vessels of that nation when importing goods *which are the product of his Brittanic Majesty's territories in Europe* (Treaty of 1815, Article the second). It is a well known fact that British vessels carry a large percentage of the goods imported into this country from other parts of the world than from Great Britain and Ireland proper, also that much of the merchandise brought from England is not the *product* of that country, but gathered from the four quarters of the earth by British traders and transshipped from the London docks to this country. This in itself would open a wide field for preference to American vessels, at the same time respecting the rights of Great Britain so far as the importation of goods from Great Britain and Ireland went, by putting the vessels of the two nations on terms of equality in that respect.

The whole question of policy and expediency was gone into and debated by Congress, as well as the nations to be benefited by treaty and to what extent, and those not to be benefited, including the limitations of the British treaty just referred to.

The Solicitor General, in his brief, cites figures arguendo, that not much good would come from enforcing the law. It we understand his figures rightly, there is an error in his method which seriously vitiates the argument that follows.

At page 62 of his brief and again at page 64 he computes the total duties at the average ad valorem rate, on the total imports in United States and treaty bottoms, but in computing it upon competitive imports he first deducts the imports, something over 90 per cent. of which are free, and applies the average ad valorem rate of $14.88 only to the balance, whereas the average ad valorem rate was ascertained on the basis of the total free and dutiable goods imported. Therefore, we submit it is erroneous to include the free goods in the first case and omit them in the second.

If this question of expediency is an arguable question before this Court, then it may be said that the ship which secures the freight on the dutiable goods would quite likely secure it on the free. Free and dutiable goods are in practice mingled in one shipment on one invoice to one importer. But all of this goes to show the futility of going into these questions which were properly addressed to the legislative branch of our Government. The thing to do would be to stop speculating about what will happen and give the law a practical trial to find out whether the collective wisdom of Congress was justified. If not, then let Congress remedy the law.

The history of the times shows Congress was seeking a way to help American shipping. Enforcing this law might not give the maximum of aid, but there is certainly a sufficient non-competitive field, even on the figures in the Solicitor General's brief, to create an entering wedge. Perhaps all American shipping needs is a slight help to give it a marked impetus. We do not believe that what would amount to a subsidy of eight or ten million dollars annually, even on the Solicitor General's figures, would be disproportionate to subsidies paid by other Governments to encourage shipping.

At page 67 of the Solicitor General's brief, still arguing about the expediency of the law, it is stated in substance that foreign exporters will naturally favor their own country's ships. Two considerations are overlooked in making that statement, first, that the American buyer has the right to dictate shipping directions and second that the discount or subsidy goes *not to the ship,* but to the importer. The law, therefore, is adroitly drawn to give the American importer the benefit, and thereby invoke his power to dictate to the foreign seller that his goods shall be shipped in American bottoms.

It is familiar law, however, that questions of policy or expediency are not for the Courts or executive department, but for the legislative.

M'Culloch *v.* Maryland, 4 Wheat., 316, 423.
Providence Bank *v.* Billings, 4 Pet., 514, 563-4.
U. S. *v.* Union P. R. Co., 91 U. S., 72.

In the case last cited this Court said, at page 61:

> "The rights of the parties rest upon a statute of the United States. Its words as well as its reason, spirit and intention, leave, in

> our opinion, no room for doubt as to its true meaning. We cannot sit in judgment upon its wisdom or policy. When we have interpreted its provisions, if Congress has power to enact it, our duty in connection with it is ended."

This whole question apparently has arisen from a dislike in or by the Executive Department with the policy of Congress in this matter, and a disagreement with Congress as to the expediency of the law. Evidently the Executive Department could not possibly bring itself to make an allowance to foreign ships entitled thereto by treaty. On the other hand, it recognized *and admitted* that it could not allow the discount to American vessels without breaking those treaties, therefore it was driven, out of necessity, to nullify the law.

It has been suggested in this case that a reduction of duties under these treaties would be unconstitutional, as an interference by the treaty-making power with the prerogative of the House of Representatives to initiate all bills affecting the revenues. That would raise a question which has been debated since the earliest times of our Government without either the House or the Senate yielding to the other on that point, namely, whether the President, by and with the advice and consent of the Senate can conclude a treaty which affects the revenues of the Government without the consent of the House.

> See Butler, Treaty-making Power of the United States, Vol. 1, page 439, Sec. 307.
>
> House of Representatives, Report No. 4177, 49th Congress, 2nd Session, March 3, 1887.

But such a question does not arise for the obvious reason that if Section J, Subsection 7, does affect the revenues by giving force to treaties theretofore made, it is in a bill originating in the House as a revenue bill, and is an *Act of Congress,* as distinguished from an act or resolve of the Senate. In other words, if we accept the contention of the House of Representatives that a treaty affecting the revenue cannot be made by the President and Senate without the consent of the House, evidenced by an Act of Congress, then in this case its consent has been given in that it joined with the Senate in declaring that these treaties should not be impaired, and the disputed question therefore does not arise.

If these minor points may be thus disposed of, we come back again to the fundamental question with respect to the proviso. In Bastin *v.* Bidwell, 18 Ch. Div., 238, at 234, the Court said, speaking of a case cited:

> "It was said there that the word 'proviso' always implies a condition. That must be taken with some qualification, because upon reference to Bacon's Abridgment, 'Covenant A' (2), it will be found that whether 'proviso' implies a condition or not must of course depend on the context; sometimes it is a mere explanation; sometimes it is an exception."

And in Carroll *v.* State, 58 Ala., 396, at 401:

> "Another purpose for which it is often employed, is to exclude some possible misinterpretation of the general words of the enacting clause, as extending to cases not intended to be brought within its purview (Minis *v.* U. S., 15 Pet., 423). It does not necessarily follow because the term provided is used that which may succeed it is a proviso, though that is the form in which an exception is generally made to or a restraint or qualifica-

> tion imposed on the enacting clause. It is the matter of the succeeding words and not the form which determines whether it is or is not a technical proviso."

See, also,

> Georgia Banking Co. *v.* Smith, 128 U. S., 174, 181.

It is obvious that the proviso here in question is not an exception, which would be illustrated by supposing that Congress had passed the enacting clause, but provided that it should not apply to sailing vessels; nor is the proviso a condition, which might be illustrated by supposing that Congress had passed the enacting clause, but provided that the crews of such vessels should all be American citizens. If, then, an attentive examination of the proviso demonstrates that it is neither an exception nor a condition, there is left only the conclusion that it is an explanation to guard against a misinterpretation.

This conclusion is strengthened when we consider that the law as proposed by the House, made no mention of foreign treaties; that the Senate raised the question that the law as proposed would violate treaties, and therefore struck it out; and, finally, that in conference a compromise was reached by restoring the enacting clause, but adding the proviso protecting treaty rights. These considerations make it plain that this proviso was made a part of the law out of an abundance of caution and to guard against any misinterpretation of the intent of Congress with respect to national treaty obligations.

It is familiar law that Acts of Congress and treaties are equally the supreme law of the land,

and that if Congress passes a law subsequent in time to a treaty, which is in direct conflict with such a treaty, the law of Congress governs and the treaty is nullified (38 Cyc., 975). When this is borne in mind it becomes apparent that the proviso was attached to the enacting clause to make it plain that Congress did not mean in passing the law to abrogate or impair any treaties.

If, then, Congress declared that a discount of 5 per cent. should be given on goods imported in American vessels, but, in giving it, declared that no treaty should be abrogated, impaired or affected thereby, we respectfully submit that the way to comply with the law is to give the discount to American vessels and to the vessels of nations entitled by treaty to equal treatment. This would be in accord with the result reached by the Customs Court.

Dated, New York, February 15, 1916.

Respectfully submitted,
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100 Broadway,
New York, N. Y.

Edward S. Hatch,
Walter F. Welch,
Of Counsel.

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IN THE

Supreme Court of the United States.

UNITED STATES OF AMERICA,
Petitioner.

VS.

THE M. H. PULASKI CO., *et al.*

Brief of William L. Wemple, Formerly Assistant Atorney General in Charge of Customs; and Petition for Leave to File the Same.

WILLIAM L. WEMPLE,
30 Broad Street,
New York City.

[illegible]

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The undersigned, WILLIAM L. WEMPLE, respectfully prays leave of the Court to file the following brief as *Amicus Curiae.*

WILLIAM L. WEMPLE.

Brief.

POINT I.

Every statute is entitled to enforcement according to the fair meaning of the language in which it is phrased.

These appeals present to the Court this question: Which if any of the cargoes involved are entitled to a discount of 5 per cent. upon the amount of duties prescribed by the various schedules of the Act of October 3, 1913, entitled *"An Act to reduce tariff duties and to provide revenue for the Government and for other purposes."*

Let it be noted here that so far as the tariff is concerned, that enactment was *to reduce duties;* the revenues for the Government were to be provided by the income tax sections. This may prove to be a consideration of importance in the discussion of the case, for this reason: It is persistently urged that "Congress could not have intended" to pass a law which in ultimate operation might have the effect of rebating 5 per cent. of the duties upon a great part of all importations.

This complaint is fairly well answered and disposed of by the title of the Act, above quoted. The purpose of the Act was to reduce duties. If it turns out that by reason of J Subs. 7 the duties levied by the Act average 23.75 per cent. of the value of dutiable importations instead of 25 per cent. as might be the case if that subsection had been omitted, that does not constitute any reason whatever for construing the subsection out of existence.

Being concerned with the litigation only from the standpoint of ship owners and shipping and without any but the most indirect interest in the result of these appeals, I shall attempt to state shortly my premises and conclusions, with some citation of authorities.

THE STATUTE:

> "J. Subsection 7. That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided,* That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

There is no ambiguous language in this paragraph. No difficulty is encountered in getting all parties to an agreement as to what a discount is; or a treaty; "impair" is a word which is perfectly understood, and "affect" has been judicially defined, if there were any trouble about its meaning (see Point III).

In the presence of clear language, it is not material or relevant to consider what was said about the bill by the floor leader either in the presence of the members, or in committee or privately. All talk of the "intent of Congress" is merely confusing; for first and last the "intent of Congress" must be found in the language Congress has used, and nowhere else. Indeed one might wish that the phrase "intent of Congress" would speedily disappear from juridical discussion; Congress has no "intent," and in the nature of things can have none. The expression is one of those meaningless figures of speech which come into use as a substitute for laborious analysis and accurate writing.

Everybody knows that the evil which brought about the enactment of this statute was the sad plight into which American-owned shipping had fallen. The law aims to give shippers an incentive in the shape of lower duties for shipping in American ships and the fact that shippers are searching for and demanding American bottoms in which to load their goods, will cause American bottoms to be supplied. Established economic principles would justify that expectation.

Still this quotation from the proceedings of Congress by appellant and appellee, goes on; but with what profit or purpose it is impossible to comprehend. It cannot be proved by such evidence that the act was not passed; or that something was passed different from what is before us (*Field* v. *Clark*, 143 U. S. 649).

POINT II.

Hence the great problem in the case is not whether this section is a law entitled to enforcement at the hands of the executive, but what relief it grants to suitors, and in what forum that relief is obtainable.

It is clear that the courts of the United States can enforce the right of goods imported in American vessels to 5 per cent. discount; the municipal law of the United States gives it to them, and no law has yet taken it away. The Act does not grant 5 per cent. to goods brought in vessels of the United States, *provided* the executive shall be of opinion the revenues will not suffer; or on condition the executive shall find the allowance of it will in fact increase and benefit American shipping.

Because, however, the executive departments held the opinion that in view of certain old treaties between this country and other nations, this law would entitle almost all importations to the discount, and leave only a small percentage to pay duties without discount, it has been ruled by them that the law is no law; that it is self-destructive, and that no cargoes whatever can be brought within the terms of the act.

Suppose it were proved by test that, treaties or no treaties, 5 per cent. discount on duties was too small an advantage to overcome the disadvantages which have driven American ship owners to operate under foreign flags; would the executive then as now hold that because it did not increase American tonnage, the importers could no longer have the discount?

It would be at least as reasonable, I submit, to take such a position after knowing something about the operation of the law or perhaps its failure to operate, as to adopt it in advance of information, and upon departmental opinion only.

The Government has involved itself in error in this case, because it started with the judgment and then looked back for grounds upon which to support it. If the easy processes of logic had been followed step by step, the result might have been unwelcome, but it would have been no less right than inevitable.

The just result in the cases at bar is clearly indicated in the opinion of Mr. Justice BRADLEY in *Russell* v. *Williams* (106 U. S. 626). The learned Justice was discussing the series of "Cape of Good Hope" statutes which first laid a surtax upon goods imported in non-treaty vessels from beyond Good Hope, and later were evolved into the statute imposing the surtax upon goods the growth or produce of countries east of the Cape of Good Hope, when imported from places west thereof; all reference to vessels being omitted.

"It will be observed," he remarks, "that the first of these laws, which was enacted in 1861, imposed the additional 10 per centum advalorem on goods imported in foreign vessels from beyond the Cape, unless they were exempt from discriminating duties by reciprocal treaty, and goods imported in American ships were *ex industria* exempted from the burden. *But it is obvious that this law would have failed to reach the object intended, since it would have been a dead letter in all cases where we had reciprocal treaties with other nations placing their ships on equality with our own.*" (Italics inserted.)

This passage is quoted because it applies as well to the case at bar as to the one in which it was used. The law was not held to be a dead letter absolutely, but as to *treaty vessels*. The difference between that case and the present is one of arithmetic; the Cape acts proposed a discrimination by surcharging the regular duties: J subs. 7 proposes a discrimination by denying a discount to any cargoes not coming in American or treaty vessels. That may be thought a clumsy way of doing the thing; but it certainly cannot be held to be an ineffectual way of dividing imported goods into two classes, one of which is to pay 5 per cent. less duties than the other.

To repeat, cargoes imported in American vessels are beyond question entitled at the hands of the Court to 5 per cent. discount in duties.

What other cargoes are entitled to that discount *at the hands of the Court?* The answer is, no others, unless imported in vessels of nations which by act of Congress are granted equal terms with American bottoms. There were statutes of this kind in effect up to October 3, 1913; namely, as to Prussian vessels, under R. S. 4229; French vessels, under R. S. 4228, and proclamation of President Grant, September 22, 1873 (18 Stat. 844), and British indirect vessels, by an earlier proclamation under the same statute. Such cargoes have in the past enjoyed equality of treatment, not under any treaty agreement as to how this Government will treat them, but under specific act of Congress, which is, of course, municipal law, and hence a rule for guidance of courts.

But those statutes must now be held to be repealed. The act of October 3, 1913, grants 5 per cent. discount to American vessels, and it in terms leaves unaffected all vessels which by treaty have acquired equality of treatment with American vessels. There are excluded from the purview of that statute all vessels except the two named classes. Therefore, every foreign vessel which, by statute, has had equality of treatment, is now excluded from the favor. It is impossible to have in force at the same time a statute which grants to foreign vessels equality of treatment with American vessels, and one which grants to American vessels a 5 per cent. discount. One or the other must fall; and it is elementary that the later in point of time destroys the earlier.

There is no escape, therefore, from the conclusion that J subs. 7 has worked a repeal of the above cited sections of the Revised Statutes.

POINT III.

The status of cargoes of treaty vessels where the treaties are unaided by legislation.

There are in existence also agreements or treaties with a number of nations, which have never been legislated upon, but remain in the form of mutual promises that the parties to them will in future refrain from enacting discriminatory duties.

The ships of such nations have brought cargoes here and claim the discount because the treaties bargain for equality, and because the statute expressly states that J subs. 7 is enacted with the fact in view, that such treaties exist, and are to continue to exist unaffected by that legislation.

The law does not disregard them; and it does not attempt to repeal them; but neither does it enact them into municipal law or "execute" them, as the phrase goes. It leaves them unaffected—unimpaired.

In 22 Stat. 525, Congress granted free entry to Hawaiian sugar, but declared that nothing in the act should "in any way change or impair the force and effect of any treaty." The effect of that language was argued to this court in *Kelly* v. *Hedden* (124 U. S. 196). It was urged there as here, that by that language the treaty became executed into municipal law. The Court answered the argument by remarking that the most that could be conceded to the provision was that it left a previous treaty relating to the matter unaffected by the Act.

The language of the proviso in J subs. 7, is in every essential, identical with that which the Court considered in *Kelly* v. *Hedden.*

All questions under promissory treaties which have not been executed into law are political questions, and are not cognizable by courts. This proposition was held by Mr. Justice CURTIS, sitting at Circuit, in *Taylor* v. *Morton* (23 Fed. Cas. 784). He then supported his decision with unanswerable logic. His opinion in that case has been time and again quoted by this court, and it constitutes the best argument in existence upon this important question. And in a matter so weighty as the one now at bar, any attempt to reprint adequate extracts from it would but mar the perfection and persuasiveness of the original. Nothing need be said of it in this brief, except to note the fact that this court has never withdrawn its frequently recorded approval of and reliance upon the reasoning of that opinion.

If *Taylor* v. *Morton* still represents the law, and if the Court adheres to the analysis in *Kelly* v. *Hed-*

den of a clause similar to the proviso in J subs. 7, then the principle of the decision of the Board of General Appraisers in these cases is sound. American bottoms are entitled to judgment ordering reliquidation with 5 per cent. discount. Cargoes of vessels which claim under R. S. 4228 *et seq.* should be denied the discount because those sections must be considered repealed, and all other cases ought to be dismissed for lack of jurisdiction.

Thereupon, the questions involved in such cases will be brought before the state department. That department will then set about an adjustment of the matter by determining whether the claimant nations have been living up to the treaty obligations; and if that be found so restitution will, of course, be made.

Necessarily, such procedure will bring into consideration the means by which certain foreign governments have stimulated their merchant marine, and encouraged and favored cargoes shipped in their ships, to the exclusion of the flag of this Government. And if it be found that other nations are using methods not contemplated when these treaties were made, but none the less effective, for discriminating against American ships, that will open the way for a revision of treaties, which will either assure this Government of actual equality in shipping, or else free it from bargains which, as the matter has worked out in practice, have prevented this country from discriminating in favor of national ships, without giving it immunity from being discriminated against.

Discriminations of the weightiest character have been practiced by certain treaty nations in favor of their shipping without resort to discriminating duties. Such duties constituted the only means of discrimination which the parties had in contemplation at the time of entering into the treaties; since then other nations by means of governmental investment at low rates of interest, and by means of mail subsidies, and by means of marine insurance arrangements, have been able to grant to their own ships precisely the same sort of favors as ship owners would derive from discriminating duties; that is to say, these favors have been so applied as to make it advantageous for shippers to seek out such vessels to load their cargoes in.

These considerations make it clear that in order that J subs. 7 shall result in the largest benefit to American shipping, there must be a revision of our treaties, so as to include therein the new forms of discrimination, which have been developed under new economic conditions. They must be brought down to date so as to be really reciprocal and equal, rather than reciprocal in point of one method of discrimination only (and that a method which European nations do not in any event care to practice).

But, however small the benefit to be conferred on American shipping under the full operation of this statute, it cannot be denied that some cargoes will come here which cannot secure this 5 per cent. discount; new fields of export and import are being now developed as never before; and as to such, the ships of this country will secure freedom from competition by vessels of non-treaty countries, at least.

How great will be the benefit to be immediately obtained by American shipping no one can predict, since the statute has so far been allowed no operation; and it is not of great importance that we should be able to state it. The chief consideration is that the statute gives American ship owners a confidence that shipping is a matter in which the lawmakers are taking an actual interest. They are given the knowledge that the development of a merchant marine is the subject of earnest and careful inquiry and experiment.

It would be remarkable indeed, if it did not cost some money to reach an intelligent and practical conclusion upon a problem so complicated and so new. This statute is a start upon the way. I am quite ready to concede that it may not be a very long step. The author of the bill, we are told, thought it was only a short step; but we may be assured that without the incentive of some such law as this, the political departments of the Government will never take up a comprehensive treatment of these treaties of an earlier generation, with a view to amending them in terms of modern discoveries and conditions. If this statute be declared self-destructive, the fostering and development of a merchant marine will be thrown back fifty years.

It has been trenchantly stated that a nation cannot have sea power without sea men. This case cannot be better summed up than in those words. In the presence of the overwhelming importance of this subject, the effect of the statute upon the revenue ought not to be mentioned. The fact that the customs revenues will be reduced from an average of say 25 per cent. advalorem to an average of 23.75 per cent. advalorem is of absolutely trifling moment, in the face of the far-reaching policy of this statute.

I have not considered it pertinent to this case to go into geography and import statistics, for the reason that such information is history; and while we can judge the future only in the light of the past, still it cannot be legally said that this statute is null and void because in the past a given state of affairs has prevailed; indeed, the act was passed for the purpose of remedying and changing that state of affairs.

To say that if the act is given full and literal operation, it will not bring under our flag any vessels would be not a judgment but a prophecy. If, however, it does result in an increase of the American merchant marine, then it is effective in the very way which was planned and hoped for.

Respectfully submitted,

WILLIAM L. WEMPLE.

FIVE PER CENT DISCOUNT CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PETITIONER, *v.* THE M. H. PULASKI CO. ET AL.	No. 496.
THE UNITED STATES, PETITIONER, *v.* R. B. HENRY CO. ET AL.	No. 497.
THE UNITED STATES, PETITIONER, *v.* JAMES ELLIOTT & CO. ET AL.	No. 498.
THE UNITED STATES, PETITIONER, *v.* J. WILE SONS & CO.	No. 499.
THE UNITED STATES, PETITIONER, *v.* ROBERT MULLER & CO.	No. 500.
THE UNITED STATES, PETITIONER, *v.* WOOD & SELICK ET AL.	No. 501.
THE UNITED STATES, PETITIONER, *v.* E. LA MONTAGNE'S SONS.	No. 502.
THE UNITED STATES, PETITIONER, *v.* ALBERT LORSCH & CO. ET AL.	No. 503.

THE UNITED STATES, PETITIONER, *v.* CULLMAN BROS. ET AL. — No. 504.

THE UNITED STATES, PETITIONER, *v.* G. W. FABER (INC.). — No. 505.

THE UNITED STATES, PETITIONER, *v.* LOUIS MEYERS & SON. — No. 506.

THE UNITED STATES, PETITIONER, *v.* WILLIAM OPENHYM & SONS ET AL. — No. 507.

THE UNITED STATES, PETITIONER, *v.* PARK & TILFORD. — No. 508.

THE UNITED STATES, PETITIONER, *v.* SELGAS & CO. — No. 509.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

BRIEF FOR THE UNITED STATES IN REPLY.

In response to the brief on behalf of the respondents the following considerations are submitted:

I.

Respondents overlook the precise terminology of subsection 7, which nowhere grants in terms a discount on imports to any other than American vessels.

The argument of counsel for the respondents is based upon a manifest gloss of the exact words in which subsection 7 is couched. Nowhere in the subsection is there a grant in express words to any save American vessels. The proviso is in language a mere rule of construction which the respondents seek to convert by inference alone into a supplemental grant. This must be accomplished, if at all, by a showing of congressional intent and not by mere assertion.

We must therefore discredit such phrases as "a discount of five per cent. to American vessels, says the principal clause; and the same to the vessels of Italy, says the proviso" (brief, p. 12); "the Government refuses to accept the subsection as meaning what it says" (brief, p. 23); or "keep within the terms of the enactment, give it the only meaning it can have, and there is in it neither doubt, contradiction, absurdity, nor unwisdom" (brief, p. 46).

These and similar expressions are merely statements of a conclusion which the respondents seek to reach, not of a premise upon which they are entitled to rely.

This tendency to ignore the exact wording of the subsection is accentuated by the reference of counsel to statutes in which language similar to that of the present proviso has been used (brief, point V, p. 37 *et seq.*). No doubt, as counsel say, the phrase "*Provided*, That nothing herein shall be so construed" as to do this or that has been often used.

We are indebted to the brief filed by Messrs. Hatch & Clute as *amici curiæ* for a classification of the functions which such provisos have performed. These are stated (p. 5) to be as follows:

> 1. To carve an exception out of a preceding general provision;
> 2. To state a condition upon which the happening of the preceding matter depends;
> 3. As an explanation to guard against a misinterpretation of the preceding matter.

Several of the statutory examples cited in the brief for the respondents have been heretofore presented and distinguished in the brief for the Government, pages 48 and 49. Notably among these is section 4, paragraph B, of the present tariff act in reference to the Cuban treaty. It was there pointed out that in each of these cases the proviso was used "to carve an exception out of a preceding general provision." The same thing is true of all the other statutory examples which counsel present. This use, however, instead of being parallel to that for which counsel contend in the instant case, is a direct antithesis.

In all of their illustrative statutes a preceding enactment, broad in terms, would, but for the limitation of the proviso, have applied to the case in question. Thus, in the present tariff act the duties are imposed on goods from all countries. Section 4, paragraph B, is clearly necessary to save rights under the Cuban treaty from the inclusive language of the enacting clause, thus cutting down the meaning of the word "all" to "all except Cuba." In the case at bar, however, counsel seek to so apply the proviso as not to cut down the grant to American vessels but to extend it to other vessels not even mentioned in terms.

We submit that the words on which this construction can be predicated are lacking.

II.

The burden is upon the respondents to show that the construction proposed by them, not being found in the literal terms of the act, conforms to some rational intent of Congress. The argument of the Government to the contrary is essentially one in rebuttal.

On page 57 of the respondents' brief we read:

> * * * the brief of the Government makes it plain that its whole case rests, directly or indirectly, on the assumption that the benefit from the operation of Subsection 7 will not be so great as might be desired, and that only partial discrimination will result, from which it concludes that the subsection is a nullity.

And, again, page 35:

> The argument against the law is not that it is unintelligible, but that it is unwise; not that it is impracticable, but that it is impolitic.

Much labor has been spent in vain if the brief for the Government can give to any unprejudiced mind this impression of the Government's attitude. We are constrained to think that it can not; and that these and like expressions in counsel's brief are simply an effort to shift from their shoulders to ours a burden whose weight they fully realize.

Of course, the Government does not contend that if Congress had passed an act extending this discount in express language to both American and foreign shipping the courts should not give it effect because it would be unwise or impolitic to do so. But when Congress has passed by the plain and simple language necessary to accomplish this result, those who would read a similar, though occult meaning into the terms actually employed must connect their interpretation with some purpose fairly imputable to Congress.

As one, and only one, of the factors tending to show that Congress could not in reason have legislated as respondents contend the statistical results of such a law were presented. By a resort to figures it was sought to demonstrate that the possible benefit therefrom to American shipping would not only be so slight in itself but would be obtained at so great cost to the revenue-producing features of the act, and would be so disproportionate to the certain bounty to shippers in vessels of our foreign rivals, as to negative any idea that a rational Congress adopted such a course. Respondents' criticism of the figures so submitted, whether the same be just or unjust, does not weaken the force or certainty of this demonstration.

Although, as the Government said in its brief (p. 60), "the tables make no pretense to absolute accuracy but only estimate reasonable results," certain of the modifications suggested by the respondents should be briefly noted. We take them in the inverse order.

BRITISH TRANSSHIPMENT TRADE.

It is objected that in estimating goods imported direct from Great Britain, and therefore covered by the British treaty ($271,320,331), we have failed to allow for goods not the product of British territory in Europe but transshipped through the British Isles. In the absence of accurate figures, counsel estimate this amount as 25 per cent of the total. Unquestionably there is such a transshipment trade, and if its amount could be ascertained it should be deducted. No figures on the subject, however, are available. But conceding, *arguendo*, that respondents' estimate is fair, it is still more than offset by the fact, as shown on page 60 of the Government's brief, that no importations whatever in Spanish, Swedish, Danish, Grecian, or Argentinian vessels were included, nor was the effect pressed of those provisions in the tariff act itself that sugar amounting annually to more than $100,000,000 (Com. & Nav., 1914, p. xxii), now paying duty, would be free from duty and hence unaffected by the discount after May 1, 1916. These items far exceed the proposed deduction for the British transshipment trade.

FRENCH IMPORTS IN FRENCH VESSELS.

It is suggested, although the point is not pressed nor argued, that the Court of Customs Appeals was correct in holding that French goods in French bottoms were not protected by treaty. In this connection there has come to our attention since the filing of the Government's main brief certain correspondence between the diplomatic representative of the French Republic and the State Department, which we print as an appendix herewith. The only force of this correspondence, of course, is to exhibit the firm insistence by the French Government upon the present vitality and protective effect of the French treaty of 1822.

THE PROPER AD VALOREM RATE.

The principal criticism, however, of the figures in the Government's brief is based upon the choice there made of the average *ad valorem* rate to be used in estimating probable duties in the protected and competitive fields. In estimating the duties in the protected field the Government used the average *ad valorem* rate of 14.88 per cent, being that upon all imports, free and dutiable, under the act. In estimating the duties to be paid in the competitive field certain imports on the free list were first deducted from the total and the same average *ad valorem* rate of 14.88 was then applied to ascertain the revenue on the dutiable remainder. This, it is said, is unfair; that either the goods on the free list should have been included in the latter total, or, after their subtraction, the average *ad valorem* on all dutiable goods of 37.60 per cent should have been used to ascertain the revenue on the balance.

This criticism is justified in a measure, and would be entirely so if the other factors in the computation were mathematically accurate.

It must be remembered, however, that the goods in the so-called protected or treaty field come in the main from European countries, where both the percentage of dutiable goods in the total imports and the average *ad valorem* rate on those dutiable are higher than is the case with imports in gross. Conversely, goods coming from the field unprotected by treaty, or the so-called competitive field, originate in the main outside of Europe, where both the ratio of dutiable to free goods and the average *ad valorem* on those goods subject to duty is lower than the gross average. If the Government's calculation, therefore, is to be nicely adapted to the actual facts a higher average *ad valorem* must be used to ascertain the revenue on those goods in the protected field.

Thus of the total imports from Europe 56.98 per cent were dutiable and only 43.02 per cent on the free list, while of the total imports from all the rest of the world only 25.66 per cent were dutiable; and from Asia, Africa, Oceania, and South America, the real competitive field to be considered, only 13.1 per cent were dutiable.[1]

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[1] On page xv, Commerce and Navigation, 1914, the following statistics of total imports appear:

From—	Total.	Free.	Per cent free.
South America	$222, 677, 075	$216, 739, 750	97. 33
Asia	286, 952, 486	222, 591, 248	77. 57
Oceania	42, 144, 398	40, 393, 524	95. 85
Africa	19, 149, 476	16, 372, 603	85. 50
	570, 923, 435	496, 097, 125	86. 89

Applying these considerations to the figures before us it is quite fair to assume that at least 50 per cent [1] of the imports in the noncompetitive or protected field would be entitled to the discount; the gross total in this field we have estimated at $1,084,013,731 (brief, p. 61); 50 per cent of this sum would be $542,006,865; and at the average *ad valorem* dutiable rate of 37.60 per cent (which is unquestionably too low for the protected field), the total duty on these goods would be $203,794,581; and 5 per cent thereof $10,189,729. The certain sacrifice of revenue, therefore, instead of the $8,065,062 (p. 60), heretofore given, would be more accurately estimated at $10,000,000 or more.

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[1] As nearly as we can calculate, if we must have mathematical exactness, this percentage is accurate. From the tables on pp. xiv, xv, and 298–300, Commerce and Navigation for 1914, the following facts appear: For the year reported $743,450,897 of imports were carried *from Europe* in existing American and treaty ships entitled to the 5 per cent discount. Of this 56.98 per cent was dutiable, or *$423,618,321*. Similarly, existing American and treaty bottoms brought $150,695,816 imports from North America, of which amount American, Norwegian, and German vessels brought from Cuba $77,258,664, from Canada $20,801,506, and from Mexico $30,516,913, or from Cuba, Canada, and Mexico together $128,577,083. The percentage of dutiable goods from Cuba is 93.99 per cent, from Canada 28.40 per cent, from Mexico 9.62 per cent; so the total dutiable goods from Cuba was $72,615,418, from Canada $5,907,627, and from Mexico $2,935,727, making a total of *$81,458,772* as the total dutiable goods *from Cuba, Canada, and Mexico*. The remaining imports from North America in treaty and American ships ($22,118,733) may be disregarded as being practically free from duty. Of the balance of the imports brought by American and treaty bottoms from the rest of the world, *i. e.*, $189,867,018 *from Oceania, Asia, Africa, and South America*, 13.1 per cent was dutiable, or *$24,872,579*. The total dutiable imports in the protected field, therefore, is *$423,618,321*, plus *$81,458,772*, plus *$24,872,579*, or *$529,949,672*. This is approximately one-half, or 50 per cent of the total imports in American and treaty bottoms entitled to the discount, viz., $1,084,013,731.

Coming back to the competitive field, it must be noted that the free goods which were subtracted therefrom are only those coming in British vessels. It is not to be assumed that the balance of $254,231,589 (Government's brief, p. 60) was altogether dutiable. As above stated, only 25.66 per cent of the total imports from all the rest of the world outside of Europe are dutiable, and, dropping the fractions, 25 per cent may be assumed as a liberal figure in estimating the total dutiable goods in the competitive field. The total competitive field being not more than $653,694,922 (Government's brief, p. 61), the dutiable portion thereof, or 25 per cent, would be $163,423,730. Adopting without further debate the average *ad valorem* rate on dutiable imports of 37.60 per cent (in this instance too high), the duties on this total would be $61,447,322, 5 per cent of which is $3,072,366.

This figure, therefore, instead of the $4,863,490 claimed by the respondents (brief, p. 61), more nearly approximates the total possible benefit in the competitive field.

In their effort to swell the possible discount to be paid in the competitive field the respondents have overreached themselves in still another particular. It was shown in the Government's brief (pp. 59–61) that goods valued at $193,424,634 were imported during the year ending June 30, 1914, in American vessels. The duties on this sum (using the average *ad valorem* rate of 14.88) would be $28,781,585, and 5 per cent thereon $1,439,079. This item, the respondents insist, should be added to the total discount possible from the competitive field and the aggregate listed as the possible benefit to American ships. But respondents overlook the fact that the payment is one not to the vessel owners but to the importers. It is not a direct subsidy, and the advantage to the merchant marine is to come from increased freights. To allow a discount of 5 per cent on goods already traveling in American bottoms is of course no encouragement to the American marine. The purpose of the bill (as respondents construe it) is not to be generous to our present customers but to attract new ones. The discount on existing shipments in American vessels is therefore properly included by us in that certain outlay which can produce no corresponding benefit.

But there is surely no great profit in debating whether the amount of the 5 per cent discount on all imports in the competitive field would be $2,000,000 (Government brief, p. 60), $3,500,000 (*supra*, p. 11), or $4,865,000 (respondents' brief, p. 61). On the one hand, the amount, though certainly much less than that in the protected field, must of necessity be a matter of mere estimate, and on the other it remains to be shown that, whether great or small, it is the American marine which will be helped by it. It must not be forgotten that in any port where an American vessel can drop her anchor and offer this discount as a bid for trade she will find either ahead of or alongside her a German, Dutch, Norwegian, Swedish, Danish, Japanese, Belgian, Italian, Spanish, Austrian, or Greek merchantman ready to make the same or better terms.

The facts and figures do, however, lead us irresistibly to these conclusions:

(1) The discount, if offered to importers in American and treaty vessels alike, affords to the former no advantage whatever over their far more numerous treaty rivals.

(2) Whatever the total discount in the competitive field, whether $2,000,000 or $4,865,000, the share of the American merchant marine therein would be certainly problematical and in reality unsubstantial.

(3) In order to grant this phantom favor there must first be a certain annual donation from the revenues of from $8,000,000 to $10,000,000, by far the greater part of which must go to importers in foreign bottoms.

(4) Even if the impossible could happen and American ships could receive the benefit of the total discount in the competitive field, no Congress framing a bill "to provide revenues for the Government" is to be charged by mere inference on doubtful language with having chosen a plan so costly and irrational.

CONCLUSION.

The true explanation of subsection 7 is to be found in the facts of its legislative history. This shows that apt words were used on behalf of two opposed branches of the legislative assembly to express purposes wholly irreconcilable. Such a union must of necessity be barren of result. A frank recognition of this fact, it is submitted, solves all the difficulties of the case.

John W. Davis,
Solicitor General.

February, 1916.

APPENDIX A.

Correspondence between the French Ambassador and the Secretary of State with reference to present vitality of the treaty with France of 1822.

[Translation.]

EMBASSY OF THE FRENCH REPUBLIC
TO THE UNITED STATES,
Washington, September 4, 1915.

MR. SECRETARY OF STATE:

The Court of Customs Appeals some time ago issued a decree stating that the 5 per cent rebate on merchandise imported into the United States in American bottoms was also applicable to that imported under the flag of powers bound to the United States by treaties which would be violated if that advantage were denied them.

The decree of the court withholds that favor from France and grants it to all the other great maritime nations in the world. I need not describe to your Excellency the impression which is likely to be created in France by a construction of the act of 1913 that would lay in store such hardships for France alone among the leading maritime countries.

My countrymen are all the more painfully and keenly surprised, as it is certainly inaccurate in my Government's opinion to say that, for lack of a treaty, France may have to bear this discrimination. Quite to the contrary, she has one and, what is not the case with many other countries, one dealing specially with that question, signed in 1822 and intended solely to abrogate, on both sides, the old mediæval institution known as the "surtaxe de pavillon" (foreign discriminating duties) which would be restored if the aforesaid decree were put into effect.

The scope of that treaty was clearly indicated in the note which, by order of my Government, I had the honor to address to the Department of State on October 11, 1913.

The judges who on pages 10 *et seq.* of their decree, cite a letter from Mr. Bassett Moore in which France is alluded to (page 12) appear to be inaccurately informed on the true situation. They assert (p. 23) that the articles of the treaty which would entitle us to equal treatment are obsolete. But my note above referred to shows, on the contrary, that they are not unprofitable to the American trade since it is by virtue of that provision, duly quoted in the preliminary remarks on the French Customs Tariff that are now in force, that the American flag is placed on the same footing as the French flag in our country.

As the judicial decree under consideration is not final, my Government firmly hopes that it will be revised in the part that concerns us and that which we should look upon as a grave injustice, in fact and in law, and for which, in addition, not even an excuse could be found in the treatment we accord to the American flag will be averted.

Be pleased to accept, Mr. Secretary of State, the assurances of my highest consideration.

JUSSERAND.

No. 1625.

DECEMBER 15, 1915.

EXCELLENCY:

I have the honor to acknowledge the receipt of your note of September 4, 1915, relative to the question of the duties which, under the stipulations of the tariff act, should be levied upon goods coming to the United States in French vessels.

In reply I have the honor to say that the Department has given careful consideration to the statements contained in Your Excellency's note with respect to the interpretation by the United States Court of Customs Appeals of the treaty concluded June 24, 1822, between this Government and the Government of France and has likewise considered the views expressed in the Embassy's note of October 11, 1913, which are at variance with the construction given by the court to Articles I, II, and VII of the treaty.

The Department understands that it is the view of Your Excellency's Government that, although Article VII by its express terms makes provision merely for the gradual and final abolition of the discriminatory duties provided for by Articles I and II, the effect of Article VII is the same as if the treaty had contained a stipulation expressly providing for reciprocal equality in the matter of duties imposed on the cargoes of vessels of each government in the ports of the other.

In view of the fact that, as the Department has observed Your Excellency is aware, the decision of the United States Court of Customs Appeals is not that of a court of last resort, and in view of the fact that the case is now pending before the Supreme Court of the United States, the Department would prefer not to express any opinion at the present time respecting the questions under consideration which, it is hoped, may soon be settled by a final decision from that branch of the Government which has the ultimate right to pass on them.

Accept, Excellency, the renewed assurances of my highest consideration.

ROBERT LANSING.

[Translation.]

EMBASSY OF THE FRENCH REPUBLIC
TO THE UNITED STATES,
Washington, January 19, 1916.

MR. SECRETARY OF STATE:

By your letter of December 15, answering my communication of September 4, Your Excellency was pleased to tell me that the question of the rate of customs duties to be collected under the tariff in force on merchandise brought to the United States by French vessels was now before the Supreme Court, and that the Department of State deemed it proper not to advance, pendente lite, any opinion as to the inferences to be drawn in this respect from the provisions of the treaty of June 24. 1822, between France and the United States.

As stated in my letters of October 11, 1913, and September 4 last, my Government does not see how there can be any doubt as to the operation of that treaty which is still in force in the opinion of both States and from which the American trade in particular still derives benefits with respect to its shipments to France.

In order to make the manner in which the question is put quite clear to the Supreme Court, I venture to suggest that that High Tribunal be given the opportunity to know exactly the reasons that justify our view of the case. I notice that the Court of Customs Appeals, whose decree is now before the Supreme Court, rendered a decision adverse to our interests and, as we see it, to equity without exactly knowing on what arguments the Government of the Republic stands. Unless I am mistaken, but a brief allusion to those difficulties made in one note from the Embassy, dated April 24, 1913, and dealing with the Administrative regulations of the new tariff as a whole, was submitted to the Court, quoted in a letter of May 28, 1913, from Mr. Moore, then Counselor of the Department of State, and reproduced on page 12 of the decree. But that quotation merely points to the untoward and unavoidable consequences to the trade of both Countries which a decision excluding us practically alone from the contemplated benefits would involve. The reasons and arguments in support of our views expounded in my note of October 11, 1913, to the Department of State were not, so far as I am to believe, imparted to the judges. I would consider it important to inform the High Court now in charge of the case of the reasons why the Government of the Republic can not but adhere most expressly to the views previously formulated by it. I should be very thankful to Your Excellency if you would kindly take suitable steps to have favorable action taken on the request I hereby have the honor to lay before you.

Be pleased to accept, Mr. Secretary of State, the assurances of my high consideration.

JUSSERAND.

His Excellency the Hon. ROBERT LANSING,
Secretary of State of the United States.

O

FIVE PER CENT DISCOUNT CASES.

In the Supreme Court of the United States.

October Term, 1915.

The United States, petitioner, *v.* The M. H. Pulaski Co. et al.	No. 496.
The United States, petitioner, *v.* R. B. Henry Co. et al.	No. 497.
The United States, petitioner, *v.* James Elliott & Co. et al.	No. 498.
The United States, petitioner, *v.* J. Wile Sons & Co.	No. 499.
The United States, petitioner, *v.* Robert Muller & Co.	No. 500.
The United States, petitioner, *v.* Wood & Selick et al.	No. 501.
The United States, petitioner, *v.* E. La Montagne's Sons.	No. 502.
The United States, petitioner, *v.* Albert Lorsch & Co. et al.	No. 503.
The United States, petitioner, *v.* Cullman Bros. et al.	No. 504.

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The United States, petitioner,
v.
G. W. Faber, Inc.
No. 505.

The United States, petitioner,
v.
Louis Meyers & Son.
No. 506.

The United States, petitioner,
v.
William Openhym & Sons et al.
No. 507.

The United States, petitioner,
v.
Park & Tilford.
No. 508.

The United States, petitioner,
v.
Selgas & Co.
No. 509.

ON WRITS OF CERTIORARI TO THE COURT OF CUSTOMS APPEALS.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General on behalf of the United States and respectfully moves the court to advance these causes for hearing on a day convenient to the court during the present term.

The cases are before the court on writs of certiorari to review judgments of the Court of Customs Appeals in what are known as the "Five Per Cent Discount Cases." They involve the construction of the act entitled "An act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, and particularly Section IV, paragraph J, subsection 7 thereof, 38 Stat. 114, 192, 196. This subsection is as follows:

> That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided,* That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

Treaties of "commerce and navigation" between the United States and most of the leading commercial nations of the world guarantee to the high contracting parties, their products and vessels, reciprocal immunity from discriminating duties.

Claims to the reduction of 5 per cent on duties otherwise imposed by the act were preferred by importers of goods in vessels admitted to registration under the laws of the United States, and by importers of goods in vessels registered under the laws of treaty nations. All claims were rejected by the customs officers upon advice of the Attorney General to the Secretary of the Treasury. The Board of General Appraisers allowed the discount to the importers in American bottoms. On appeal, majority of the Court of Customs Appeals held that all claimants were entitled to the 5 per cent discount. DE VRIES, J., dissenting, was of opinion that so long as the treaties guaranteeing reciprocal immunity from discrimination were in force the discount should not be allowed at all.

The cases are class cases, representative of a multitude of similar claims. The great majority of imports are transported to this country in bottoms of the treaty nations. The questions involved are of general public interest and of importance to the revenues.

Opposing counsel concur in this motion.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1915.

FIVE PER CENT DISCOUNT CASES.

In the Supreme Court of the United States.

October Term, 1914.

The United States, Petitioner,
v. No. ——.
The M. H. Pulaski Co. et al.

The United States, Petitioner,
v. No. ——.
R. B. Henry Co. et al.

The United States, Petitioner,
v. No. ——.
James Elliott & Co. et al.

The United States, Petitioner,
v. No. ——.
J. Wile Sons & Co.

The United States, Petitioner,
v. No. ——.
Robert Muller & Co.

The United States, petitioner,
v. No. ——.
Wood & Selick et al.

The United States, petitioner,
v. No. ——.
E. La Montagne's Sons.

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THE UNITED STATES, PETITIONER,
v.
ALBERT LORSCH & CO.
} No. ——.

THE UNITED STATES, PETITIONER,
v.
CULLMAN BROS. ET AL.
} No. ——.

THE UNITED STATES, PETITIONER,
v.
G. W. FABER.
} No. ——.

THE UNITED STATES, PETITIONER,
v.
LOUIS MEYERS & SON.
} No. ——.

THE UNITED STATES, PETITIONER,
v.
WILLIAM OPENHYM & SONS.
} No. ——.

THE UNITED STATES, PETITIONER,
v.
PARK & TILFORD.
} No. ——.

THE UNITED STATES, PETITIONER,
v.
SELGAS & CO.
} No. ——.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CUSTOMS APPEALS, AND BRIEF IN SUPPORT.

The United States prays for writs of certiorari to the Court of Customs Appeals to review the decision and judgments of that court rendered on the 26th day of May, 1915, in the above-styled fourteen cases, which are known as the "Five Per Cent Discount Cases."

CHARACTER OF CASES.

These are appeals from decisions of the Board of General Appraisers, taken by the United States and by sundry importers, respectively, to the Court of Customs Appeals. They involve the interpretation and construction of section IV, paragraph J, subsection 7, of the act entitled "An Act To reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913. 38 Stat. 114, 192, 196. This section is as follows:

> That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

The treaties so referred to are those commonly entitled treaties of "commerce and navigation" now in existence between the United States and most of the nations of the world, which guarantee to the high contracting parties, their products and vessels reciprocal immunity from discriminating duties.

There is also involved the treaty between Cuba and the United States of December 11, 1902, 33 Stat. 2136, granting to merchandise imported from Cuba a preferential reduction of 20 per cent on the normal tariff rates, and guaranteeing to similar articles of both countries equal treatment in their respective ports.

CLASSES OF CLAIMS.

Under this statute and these treaties claims to the reduction of 5 per cent on duties otherwise imposed by the act are preferred by four classes of claimants.

First. Importers of goods in vessels admitted to registration under the laws of the United States. (Such are the foregoing cases of *The United States* v. *J. Wile Sons & Co.; The United States* v. *G. W. Faber; The United States* v. *Louis Meyers & Son; The United States* v. *William Openhym & Sons; The United States* v. *Park & Tilford;* and *The United States* v. *Selgas & Co.*)

Second. Importers of goods in vessels registered under the laws of treaty nations. (Such are the cases of *The United States* v. *The M. H. Pulaski Co. et al.; The United States* v. *R. B. Henry Co.; The United States* v. *James Elliott & Co. et al.; The United States* v. *Robert Muller & Co.; The United States* v. *Wood & Selick et al.; The United States* v. *E. La Montagne's Sons; The United States* v. *Cullman Bros. et al;* and *The United States* v. *Albert Lorsch & Co. et al.*)

Third. Importers of goods brought into the United States before the 3d day of October, 1913, entered without payment of duty and under bond for warehousing; this merchandise being, in turn, of two classes, (*a*) that imported in vessels of United States registry and (*b*) that imported in vessels of treaty nations. (Such are the cases of *The United States* v. *Wood & Selick et al.*; *United States* v. *James Elliott & Co. et al.; The United States* v. *Culiman Bros et al.*)

Fourth. Importers of Cuban goods in American bottoms, who claim in addition to the 20 per cent reduction provided by the Cuban treaty the 5 per cent discount allowed by the section in question. (Such are the cases of *The United States* v. *G. W. Faber*; *The United States* v. *Park & Tilford; The United States* v. *Selgas & Co.*)

The Secretary of the Treasury, upon advice of the Attorney General, directed the customs officers to reject claims of any and all these classes.

The Board of General Appraisers sustained the contentions of those claimants of the first and fourth classes; but overruled the contentions of claimants of the second and third classes. The Court of Customs Appeals sustained the contentions of all claimants.

The United States contends that the action of the Secretary of the Treasury was correct, and that to none of these various classes of claimants can the 5 per cent discount be allowed.

BRIEF.

I.

The sole purpose of Congress in the section under discussion was to develop an American merchant marine by means of discriminating duties on goods carried in American bottoms.

This clearly appears from the legislative history of the act.

As introduced by Mr. Underwood in the House on April 7, 1913, the paragraph in question read:

> Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares and merchandise as shall be imported in vessels built in the United States, and which shall be wholly the property of a citizen thereof.

When the bill was next ordered printed, on or about April 21, the section read:

> Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States.

The subsection was in this form when the bill was finally sent to the Senate. The explanation given concerning it in the Report of the Ways and Means Committee (Report No. 5; 63d Cong., 1st sess.), April 22, 1913, is as follows:

> Subsection VII of Paragraph J is new legislation providing that a discount of 5 per cent.

> on all duties imposed at the custom houses shall be allowed on such goods, wares and merchandise as shall be imported in vessels admitted to registration under the laws of the United States. It is a discrimination in favor of American shipping, similar to the provisions of some of the first tariff bills that were enacted by the Congress of the United States. Under like legislation the merchant marine of the United States was encouraged and developed in the early decades of the last century until our merchant marine became the largest carrier of merchandise in the world. We believe that to again discriminate in favor of American shipping will build up our merchant fleet and keep at home millions of dollars that are now being paid to foreign vessels to carry the products of our country to foreign markets. (Report No. 5, 63d Cong., 1st Sess., page LII (to accompany H. R. 3321).

On July 18, 1913, the Finance Committee of the Senate reported the bill, with the recommendation that it do pass as amended (Cong. Rec., vol. 50, pt. 3, pp. 2507–2515). Among other changes, the committee struck out the entire subsection 7, accompanying their action with the following explanation:

> Your committee struck out subsection 7 of paragraph J, page 263, giving a discount of 5 per cent. on all duties upon goods imported in American bottoms. The provision was in contravention of some 19 or 20 treaties of the United States, without having been preceded by the courtesy of a notice of revoca-

> tion, and was very properly protested against by the high contracting parties with whom we had the treaties. In our opinion, it would have led to no good result, as every other country could have retaliated, and all the countries at the end would have been just about where they started. Moreover the country which could use that principle with most force and effect in injuring other countries would be the country with the largest merchant marine, and the country which could least effectively use it would be the country with the smallest merchant marine. We were therefore not only inviting an endless retaliation but a retaliation where our opponents would have had in nearly every case the better of it, and in many cases infinitely the better. [Cong. Rec., vol. 50, pt. 3, p. 2515; see also pt. 5, p. 4494.]

The bill was accordingly returned to the House with the subsection entirely stricken out. In conference an effort was made to reconcile the difference between the two Houses, and the subsection was cast in its present form, and in that form was finally enacted.

II.

The Congressional purpose of favoring American bottoms is obstructed by treaty provisions to the contrary. These Congress determined to respect and by the proviso it suspended, if it did not nullify, the grant to American bottoms.

On October 3, 1913, we had, and still have, treaties of commerce and navigation with almost all of the important commercial countries of the globe, guaranteeing to their ships and cargoes when entering our ports the same treatment as we give to our own. The list comprises the following:

> Argentine Republic, Austria-Hungary, Belgium, Bolivia, China, Colombia, Corea, Costa Rica, Denmark, France, Germany, Great Britain, Greece, Honduras, Italy, Japan, Liberia, The Netherlands, Norway, Paraguay, Spain, and Sweden.

The treaty with Italy dated November 18, 1871, is a typical illustration of these guarantees. Article V of the same reads as follows:

> The high contracting parties agree that whatever kind of produce, manufactures, or merchandise of any foreign country can be from time to time lawfully imported into the United States, in their own vessels, may be also imported in Italian vessels; that no other or higher duties upon the tonnage of the vessel or her cargo shall be levied and collected whether the importation be made in vessels of the one country or the other; and, in like manner, that whatsoever kind of produce, manufactures, or merchandise of any foreign country can be from time to time lawfully imported into Italy in its own vessels may be also imported in vessels of the United States, and that no higher or other duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other; and they further agree that whatever

> may be lawfully exported and reexported from the one country, in its own vessels, to any foreign country, may in the like manner be exported or reexported in the vessels of the other country, and the same bounties, duties, and drawbacks shall be allowed and collected, whether such exportation or reexportation be made in vessels of the United States or of Italy.

In addition, we have treaties of commerce with even such small countries as Congo, Muscat, Morocco, Tripoli, Ethiopia, Persia, Servia, and Tonga, whereby we have in effect obligated ourselves to treat their commerce as well as that of the most favored nation. Perhaps the most important countries with which we have no such treaties are Brazil, Bulgaria, Chile, Uruguay, Venezuela, Nicaragua, Mexico, Portugal, Roumania, and, since 1911, Russia.

The claimants in the cases at bar rely upon treaties existing with Great Britain, the German Empire (or its constituent States), Norway and Sweden, Austria-Hungary, The Netherlands, Italy, Belgium, Japan, and Spain.

Congress, as shown by the report of the Senate above quoted, was fully advised of the purport and existence of these treaties. Pending debate on the bill, a resolution of the Senate called upon the Secretary of State to transmit to the Senate copies of all objections or protests made by foreign nations against the adoption of the paragraph as enacted by the House, and such documents were transmitted. (See

Senate Doc. No. 179, 63d Cong., 1st Sess.) It appeared that 29 nations had protested. (Cong. Rec., vol. 50, pt. 5, p. 4497.)

The Senate shrank from such a disturbance of our treaty relations, and so insisted upon the addition of the proviso, the effect of which, as the Government contends, is either to nullify the clause altogether by rendering it impossible of performance, or to postpone the preference to American bottoms until our treaty relations can be modified so as to permit it.

III.

Goods in treaty bottoms are not entitled to the discount because by the intent of Congress and the express language of the act the grant is confined to American bottoms.

Neither in the language of the act nor in its legislative history is there any indication of a desire on the part of Congress to grant this discount to goods entering in vessels of any other than American registry.

The Board of General Appraisers and the minority of the Court of Customs Appeals so considered; but, holding that these treaties of commerce and navigation were promissory only, executory and not self-executing, they found the grant to American bottoms unimpeded by the existence of the treaties. The majority of the Court of Customs Appeals, on the other hand, held the treaties to be self-executing, and a legislative declaration against abrogating, impairing, or affecting them to be tantamount to an express grant of 5 per cent discount to treaty bottoms.

But Congress in what seem unmistakable terms, and for a definite purpose, confined the discount to American bottoms. It can not be supposed that it intended at the next moment to destroy the entire economic and maritime effect of this discrimination by granting a like privilege to practically all the great trading nations of the world.

IV.

Goods warehoused prior to October 3, 1913, are not entitled to the discount for the foregoing reasons, and for the further reason that the discount is granted to future importations only.

This appears from the language of subsection 7, which is that the discount shall be allowed on goods which "shall be imported," clearly implying a future importation.

It is true that paragraph Q of Section IV of the tariff act of 1913 provides that goods in warehouse "shall be subjected to the duties imposed by this act and to no other duty, upon the entry or the withdrawal thereof;" but paragraph J, subsection 7, now under consideration, does not impose a duty, but grants a reduction for certain considerations having to do with future events. It is prospective only.

V.

Cuban goods, whether imported in American or Cuban bottoms, are not entitled to the discount.

The treaty with Cuba of December 11, 1902, 33 Stat. 2136, in addition to certain specific reductions, grants a general reduction of 20 per cent on products of the soil or industry of Cuba imported into the United States; but by Article VII of the same treaty it is agreed that similar articles of both countries shall receive equal treatment on their importation into the ports of the United States and the Republic of Cuba, respectively. The Government contends that the reduction of 20 per cent exhausts the privilege to which such goods are entitled, and to add thereto a discount of 5 per cent on American entry which would not be enjoyed by American goods entering a Cuban port would be to abrogate, impair, or affect the reciprocal provisions for equal treatment found in Article VII of the treaty.

VI.

If no precise or intelligible meaning consistent with the manifest intention of Congress can be given to paragraph J, subsection 7, premise and proviso, it must be held to be void and of no effect.

If the initial clause and the proviso of this section are irreconcilable and mutually destructive, the statute is void.

Notwithstanding the customary presumptions in favor of the validity of a legislative act, it will not do to abandon the legislative intent in order that a forced meaning may be substituted. Better that the words used should be declared inadequate for the purpose intended than that interpretation should usurp the function of legislation.

REASONS FOR THE WRIT.

The cases at bar are believed to have had much to do with the passage of the act amending section 195 of the Judicial Code, approved August 22, 1914. (Public No. 180, 63d Cong., 2d Sess.)

In accordance with that act, the Attorney General, before the decision of the Court of Customs Appeals was rendered, filed in each case a certificate to the effect that the case was of such importance as to render expedient its review by the Supreme Court. It is manifest, moreover, that there are drawn in question sundry treaties made pursuant to the Constitution of the United States. The cases are class cases, representative of a multitude of similar claims. The questions involved are of general importance and of great consequence to the public revenues.

It is respectfully submitted that writs of certiorari should issue as prayed.

JOHN W. DAVIS,
Solicitor General.

JUNE, 1915.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PETITIONER,
v.
THE M. H. PULASKI CO. ET AL.
No.----

THE UNITED STATES, PETITIONER,
v.
R. B. HENRY CO. ET AL.
No.----

THE UNITED STATES, PETITIONER,
v.
JAMES ELLIOTT & CO. ET AL.
No.----

THE UNITED STATES, PETITIONER,
v.
J. WILE SONS & CO.
No.----

THE UNITED STATES, PETITIONER,
v.
ROBERT MULLER & CO.
No.----

THE UNITED STATES, PETITIONER,
v.
WOOD & SELICK ET AL.
No.----

THE UNITED STATES, PETITIONER,
v.
E. LA MONTAGNE'S SONS.
No.----

The United States, Petitioner,
v.
Albert Lorsch & Co.
No.----

The United States, Petitioner,
v.
Cullman Bros. et al.
No.----

The United States, Petitioner,
v.
G. W. Faber.
No.----

The United States, Petitioner,
v.
Louis Meyers & Son.
No.----

The United States, Petitioner,
v.
William Openhym & Sons.
No.----

The United States, Petitioner,
v.
Park & Tilford.
No.----

The United States, Petitioner,
v.
Selgas & Co.
No.----

BRIEF OPPOSING PETITION FOR CERTIORARI.

Statement.

It is submitted on behalf of the Respondents that no writ should be granted, as prayed for herein.

The United States seeks to review a judgment of the United States Court of Customs Appeals, created by Section 29 of the Tariff Act of August 5, 1909 (36 U. S. Stat., 11). The petition is filed pursuant to the Act of August 22, 1914, amending Sec. 195 (Act of March 3, 1911, 63d Cong., 2d Sess., Ch. 367), which provides:

> "An act to amend section one hundred and ninety-five of the Act entitled 'An Act to codify, revise, and amend the laws relating to the judiciary,' approved March third, nineteen hundred and eleven.
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one hundred and ninety-five of an Act entitled 'An Act to codify, revise, and amend the laws relating to the judiciary,' approved March third, nineteen hundred and eleven, be, and hereby is, amended so as to read as follows:
>
> "SEC. 195. That the Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases; Provided, however, That in any case in which the judgment or decree of the Court of Customs Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court, upon the petition of either party, filed within sixty days next after the issue by the Court of Customs Appeals of its mandate upon decision, in any case in which there is drawn in question the construction of the Constitution of the United States, or any part thereof, or of any treaty made pursuant thereto, or in any other case when the Attorney General of the United States shall before the decision of the Court of

> Customs Appeals is rendered, file with the court a certificate to the effect that the case is of such importance as to render expedient its review by the Supreme Court, to require, by *certiorari* or otherwise, such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court: And provided further, That this Act shall not apply to any case involving only the construction of section one, or any portion thereof, of an Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August fifth, nineteen hundred and nine, nor to any case involving the construction of section two of an Act entitled 'An Act to promote reciprocal trade relations with the Dominion of Canada, and for other purposes,' approved July twenty-sixth, nineteen hundred and eleven."
>
> Approved, August 22, 1914.

The issue here involved turns upon the interpretation to be given Section 4, Paragraph J, Sub-section 7 of the Tariff Act of 1913 (63d Cong., 1st Sess., Ch. 16), to wit:

> " That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The existing tariff law became effective on October 3, 1913. The Government theory of interpretation is accurately reflected by the official letter of instructions of the Secretary of the Treasury addressed to collectors and other officers of customs dated November 8, 1913. It is printed in Treasury Decisions, 33847:

> "Discount on duties imposed on merchandise imported in American vessels.
>
> Instructions in T. D. 33782 to make no allowance of discount on duties under subsection 7 of paragraph J of section 4, tariff act of 1913, made permanent following the opinion of the Attorney General.
>
> TREASURY DEPARTMENT, November 8, 1913.
>
> To collector and other officers of the customs:
>
> The Attorney General having been asked for an expression of his views upon the interpretation of subsection 7 of paragraph J of section 4 of the tariff Act of October 3, 1913, he advises the department that the 5 per cent. discount to American vessels only, which was the primary object of the subsection, can not be given without impairing the stipulations of existing treaties between the United States and various other powers and that consequently the subsection, by the express terms of the proviso, is inoperative.
>
> Under these circumstances you are hereby instructed to make no allowance of discount on duties under the subsection in question and to proceed with liquidation of entries leaving importers who are dissatisfied with such liquidations to their remedy by way of protest under the provisions of paragraph N of section 3 of the said tariff act.
>
> W. G. McADOO,
> Secretary.

We set forth Articles 3 and 4 of the treaty of 1829 with Austria-Hungary, cited by the Board of General Appraisers in its opinion, as typical of the treaty provisions here drawn in question:

ART. III.

> "All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the

United States of America, or of any other country, which may be lawfully imported in the ports of the dominions of Austria, in Austrian vessels, may also be so imported in vessels of the United States of America, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said States, may also be so imported in Austrian vessels without paying other higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America."

ART. IV.

"To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles are, to their full extent, applicable to Austrian vessels and their cargoes arriving in the ports of the United States of America; and, reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country. (Treaties, Conventions, International Acts, Protocols, and Agreements, between the United States and Other Powers, 1776–1909, vol. 1, p. 30; 8 Stat. L., 228)."

Any review of the character of the cases here sought to be reviewed is rendered superfluous by the analysis of the Solicitor-General on pages 3 *et seq.* of his brief.

BRIEF.

The House is not to be confused with Congress. Conceding freely that the House sought in passing the main body of Sub-section 7 to discriminate in favor of American bottoms, the action of Congress in finally adopting the proviso as the outcome of a dispute between the House and the Senate, duly approved by the Executive, clearly evinces a legislative determination to favor American shipping in a way consistent with our solemn treaty obligations. In other words, the proviso recognizes, ratifies, and adopts as the law of the land the obligations which the treaties impose upon us with respect to equal treatment of cargoes imported in foreign treaty bottoms, and therefore the discount should be allowed to goods imported in vessels of American registry and in vessels of treaty nations.

It is unnecessary to duplicate the recital of the Solicitor-General as to what occurred in the House. It appears from Senate Document No. 179, 63rd Cong., 1st Session, that after the Bill passed the House the Secretary of the Treasury, on May 26th, 1913, inquired of the Secretary of State :

> " It has been pointed out to me, directly and indirectly, that this provision may result in the violation of many of our treaties with foreign nations, and is almost sure to result in international complications and diplomatic negotiations. Consequently, I earnestly suggest the advisability of submitting to the counselor for the State Department, or such other officer as you may deem proper, the question as to whether or not this provision is in violation of any existing treaty rights."

and to this John Bassett Moore, then Counselor of the State Department, answered the Secretary as follows:

> "The various stipulations above quoted suffice to show the purport of the treaty provisions with which the proposed subsection is alleged to conflict. This allegation appears to be well founded if, as seems to be the case, it is intended by the subsection to allow the discount on duties only on merchandise imported in American registered vessels. Governments having treaty stipulations with the United States such as those above quoted probably would not object to the discount if it were extended, in conformity with those stipulations to merchandise imported into the United States in their respective vessels; but they would not acquiesce in discriminatory levy of lower duties on goods imported into the United States in American registered vessels because it was called a discount. It is the fact that a lower duty is charged, and not the term by which the reduction is described, with which the department is obliged to deal."

Thereafter, on July 18, 1913, the Finance Committee of the Senate reported the Bill with this comment, as appears from page 7 of the Solicitor General's brief:

> "Your committee struck out subsection 7 of paragraph J, page 263, giving a discount of 5 per cent. on all duties upon all goods imported in American bottoms. The provision was in contravention of some 19 or 20 treaties of the United States, without having been preceded by the courtesy of a notice of revocation, and was very properly protested against by the high contracting parties with whom we had the treaties."

Subsequently after the Bill had passed the Senate and had gone to Conference, the Solicitor of the State Department transmitted to Chairman Simmons of the Finance Committee a communication in which he called attention to the commercial treaties between this Government and other nations which contain "provisions securing for the citizens and subjects of each of the contracting powers reciprocal equity in the matter of duties imposed on the cargoes of the vessels of each country in the ports of the other." He gave a list of such treaties and also called attention to the narrower and more restricted scope of the British treaty of 1815 (See Cong. Rec., Vol. 50, Part 6, pp. 5345, 5346). In the light of this brief survey, unless we impute to Congress an intention to do a vain and meaningless thing, how can it be said that the intent of the proviso was other than to recognize, ratify, and adopt as the law of the land the obligations which the treaties impose upon us with respect to equal treatment of cargoes imported in foreign treaty bottoms. This is accomplished by a section of an act originating in the House of Representatives, amended in the Senate, passed by both Houses and signed by the President, a procedure in exact accord with the constitutional requirements.

IT IS OBVIOUS, THEREFORE, THAT A DECISION AS TO WHETHER WHAT MAY BE TERMED THE SHIPPING CLAUSES OF OUR VARIOUS TREATIES (SUCH AS ARTICLES 3 AND 4 OF THE TREATY WITH AUSTRIA-HUNGARY OF 1829) STANDING ALONE OPERATE EX PROPRIO VIGORE IS NOT ESSENTIAL TO THIS CASE.

The United States in effect admits this. We quote from Judge BARBER's opinion in the Court below:

> "*At the outset the Government unqualifiedly concedes that the said reciprocal commercial provisions are effective and in force as the law of the land, and that by virtue thereof any discount that may be legally allowed to merchandise imported in vessels of United States registry must also be allowed to the like merchandise when imported in vessels of the foreign-treaty nations—that is, if it is allowed to merchandise imported in our vessels, it cannot be denied to like merchandise imported in said foreign vessels without violating said reciprocal commercial provisions. It also concedes that it is within the*

> *jurisdiction of the judiciary to consider and construe said reciprocal provisions.*"

The nub of the Government's argument under point II. is that the addition of the proviso had for its object,

(a) "either to nullify the clause altogether by rendering it impossible of performance".

(b) or to "postpone the preference to American bottoms until our treaty relations can be modified so as to permit it".

The answer to *(a)* is found in that class of cases decided by this Court and cited in Judge BARBER's opinion in support of the propositions:

> "It will be presumed that the lawmaking body will not do a vain thing, and that it intends that its acts and every part of them are valid and capable of being carried into effect" (Lewis's Sutherland Statutory Construction, sec. 497).
>
> "All statutes are to be so construed as to sustain rather than ignore or defeat them; to give them operation, if the language will permit, instead of treating them as meaningless" (Lewis's Sutherland Statutory Construction, sec. 498).
>
> *Bird vs. United States*, 187 U. S., 118.
> *Bernier vs. Bernier*, 147 U. S., 242.
> *Louisville Water Co. vs. Clark*, 143 U. S., 1.
> *Market Company vs. Hoffman*, 101 U. S., 112.
> *Platt vs. Railroad Company*, 99 U. S., 48.

As the Court below said in rejecting the Government contention and in adopting the conclusion reached by it:

> "not only do we give force and effect to all the language of the subsection and hold that the proviso is not repugnant to the body thereof but we also acquit Congress of the charge of having in form enacted a statute which, although clothed in language apt for present enforcement as to all its parts, was, nevertheless, not designed as a statute at all".

The answer to (*b*) lies in the fact that the modification of our treaty relations so as to permit exclusive preference to American bottoms is essentially one of the functions of Congress itself.

> "It is a common practice to insert in treaties a provision by which they may be terminated by notice of a duration, given by one contracting party to the other. *In the United States the question has arisen as to how this notice, when given by the President, should be authorized. Usually it has been given under the authority of a joint resolution of Congress*" (Moore, International Law Digest, Volume V., p. 322).

Innumerable instances can be cited in support of this. As typical, see joint resolution providing for the termination of the Reciprocity Treaty of 1854 between the United States and Great Britain approved Jan. 18, 1865 (13 U. S. Stat., 566); joint resolution terminating the Treaty of 1827 with Great Britain relating to the joint occupation of Oregon (9 U. S. Stat., 109); resolution of the Senate in Executive Session authorizing the President at his discretion to terminate the Treaty of Commerce with Denmark to 1826 (Executive Journal, Volume IX., pages 430 and 431). This latter resolution was based upon the view that the concurrent action of the two Houses was not necessary, but that the action of the Senate as one of the treaty making powers sufficed in conjunction with the action of the Executive. In the case of Russian Treaty, referred to in the dissenting opinion of Judge DE VRIES, it is true that the notice was first given by the Executive obviously to save a year's time by reason of the peculiar wording of the Article providing for the denunciation of the Treaty of 1832, but *it is significant that the sanction of Congress by a joint resolution was deemed important* (37 U. S. Stat., 627). It is confidently asserted that the only instance of action by the Executive alone is found in the case of the Swiss Treaty referred to in the dissenting opinion, where two Articles only were denounced by this method.

That Congress was well aware of the *usual* practice with respect to the termination of treaties is apparent when it is borne in mind, as pointed out in the opinion of the Court below, that amendments were proposed providing for the abrogation of all treaties contravening discriminatory treatment in favor of American bottoms. The amendments were rejected (50th Cong. Rec., Part V., pages 4494 and 4548). It is a matter of public record that various measures for the relief of the American Merchant Marine have been proposed in Congress of late years and every one of them have carried sections directing the President to annul or abrogate the contravening articles in our commercial treaties in conformity with their stipulation, see:

Cong. Rec., 55th Cong., 1st Sess., Vol. 30, pp. 580-600.
58th Cong., 2nd Sess. Sen., 2154.
61st Cong., 2d Sess., H. R. Rep., 502, Part 2.
63d Cong., 1st Sess., H. R., 1930.

Section IV. of the Tariff Act of 1909 directed the President to terminate various Commercial Agreements entered into in conformity with authority granted by the Dingley law of 1897.

With undoubted knowledge of all these precedents, does it seem plausible to urge that Congress after rejecting amendments to terminate the treaties, intended by the adoption of the proviso to keep the law in a state of suspension until the Executive, quite contrary to the recognized practice, should at his convenience, without the direction of Congress, alone do the very thing which Congress had flatly declined to do? Does it seem plausible to urge that the Executive would have undertaken on his own responsibility without the direction of Congress to embark upon a policy calling for the wholesale abrogation of existing Commercial Treaties?

There is nothing that we can add to the admirable discussion which is found in Judge BARBER's opinion regarding the scope to be given to the words "impair or affect" in Subsection 7, except perhaps to emphasize that such phraseology has been selected by Congress on many occasions in harmony with the construction adopted by the Court below. See Section 6, Act of March 27, 1804, 2 U. S. Stat., 299, 300; Section 3, Act of February 5, 1816, 3 U. S. Stat., 253; Act of January 14, 1817, 3 U. S. Stat., 344. Note also Section 4, Paragraph B of the Act of October 3, 1913, which provides

> "that nothing in this Act contained shall be so construed as to abrogate or in any manner impair or affect the provisions of the treaty of commerce and reciprocity concluded between the United States and the Republic of Cuba, etc."

It is said in the opinion of the dissenting Judge in the Court below:

> "How can it be said we discriminate in favor of American shipping when we give the same favor to all its important and effective competitors."

And further:

> "It appears from the majority opinion that there are at least 5,500 treaty-nation vessels in the American foreign trade. It is certain that there are not over 50 American vessels. Did Congress, in order to benefit these 50 vessels and such as might in the course of years—necessarily few under this interpretation—register under our flag immediately give an equal bounty to 5,500 other vessels? If so, where was the 'favor' to 'our ships'?"

This inquiry surely overlooks the statistics in the majority opinion with respect to British and French tonnage—the former far outstripping that of all other nations in magnitude;

it as certainly overlooks the official figures of the Department of Commerce which were recognized as authoritative by all parties and by the Court below, with respect to the trade in American vessels. These figures showed the entry in the foreign trade during the year ending June 30, 1913, of upwards of 9,322 American vessels, arriving with cargoes, the aggregate tonnage of which vessels was 6,423,356 tons, and 9,709 American vessels arriving in ballast having a tonnage of 6,649,211 tons. The large proportion of American vessels arriving in ballast is significant. The possibility of their carrying cargoes if this discount were operative at once suggests itself. (Commerce and Navigation of the United States, 1913, p. 875.)

The prevailing opinion clearly points to the disallowance of the discount on goods imported in French bottoms, and also in the case of the British indirect carrying trade. The latter item especially bulks large. The British merchant marine is in evidence in the four corners of the earth. Indeed, the respondents claim to have demonstrated in the Court below, and their claim was largely sustained by the majority opinion, that more than 8,000 vessels having a tonnage in excess of 12,000,000 tons, which entered at our ports during the fiscal year ending June 30, 1913, were unprotected by treaty guaranties.

All this was in effect pointed out to Congress in the communication of the Solicitor of the State Department and was presumably known to it. THE INFERENCE IS PLAIN THAT IN GRANTING THE DISCOUNT IN THE CASE OF AMERICAN BOTTOMS, CONGRESS REALIZED THAT IT WAS CONFERRING A SUBSTANTIAL FAVOR UPON THE AMERICAN MERCHANT MARINE, AND ONE THAT UNDER THE EXISTING TREATIES WOULD NOT BE CONFERRED UPON "ALL ITS IMPORTANT AND EFFECTIVE COMPETITORS."

Warehoused Goods.

Our adversary makes a contention under Point IV. that Sub-section 7 being prospective only cannot affect warehoused goods.

The law as to such merchandise has long been embodied in provisions corresponding to Section IV., Paragraph " Q " of the present law, and of Section III., Paragraph " S " :

> SEC. IV., PAR. " Q " : " That on and after the day when this Act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bonds for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subject to the duties imposed by this Act and to no other duty, upon the entry or the withdrawal, thereof ; *Provided*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry."
>
> SEC. III., PAR. " S " : " Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal : *Provided*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles."

It was this policy of law, no doubt, which led Congress to adopt the language in Paragraph " J ", Subsection 7, that " a discount of 5 per centum on all duties *imposed by this Act* shall be allowed." The plain effect of this language is to put warehouse goods withdrawn under the new law upon precisely the same terms as goods arriving and entered under the new law. Such a provision is entirely consistent and altogether in harmony with our settled policy with respect to warehouse goods which is founded on the theory, no doubt, THAT THE IMPORTATION OF FOREIGN GOODS IS NOT COMPLETE AS BETWEEN THE IMPORTER AND THE GOVERNMENT, SO LONG AS THE GOODS REMAIN IN THE CUSTODY OF THE OFFICERS OF THE CUSTOMS.

American Cigar Co. vs. United States, and
Falk vs. United States, 146 Fed. Rep., 484.
Hartranft vs. Oliver, 125 U. S., 525.
United States vs. Benzon, 2 Cliff, 512; 24 Fed. Cas., 1112, cited in *Fabbri vs. Murphy*, 95 U. S., 192.

The Board denies the claim as to such warehouse goods, whether imported in vessels of American or foreign registry. Two reasons are given for this attitude both of which can be conclusively answered.

First of all, it is said that "the language of Subsection 7 is that the discount shall be allowed on goods which 'shall be imported,' which implies a future importation" (Rec., 47). In the same way it must be said that, because the enacting clause of the Act of October 3d, 1913, provides that on and after the day following the passage of the act rates of duty "*shall* be levied, collected and paid upon all articles when imported from any foreign country," future importations only are implied. The answer is, of course, that warehouse goods are for tariff purposes future importations.

Cuban Goods.

The Government's contention in this respect is fully met and answered in the prevailing opinion on which counsel rely for an exhaustive discussion on this as on other branches of this case. A precise statement of the issue in this connection will solve such difficulties as might otherwise arise. Contrary to what seems to be intimated by the caption on page 12 of the Government's brief, the importers do not claim that Cuban goods or any other goods imported in Cuban vessels are entitled to the benefit of the five per cent. discount. They claim merely that Cuban goods are, like other goods, entitled to the discount when imported in American vessels. Nor is it accurate to say that the importers ask that a discount of five per cent. shall be added to the 20 per cent. preferential reduction provided by the Cuban treaty. The importers ask only what the treaty clearly demands, to wit, that the 20 per cent. preferential reduction be made from the duty actually applicable to the same kind of goods when imported into the United States from other countries. To deny the five per cent. discount to Cuban tobacco imported in American vessels, while allowing it to tobacco from other countries, would manifestly destroy the 20 per cent. preferential discrimination to which Cuban tobacco is entitled by the Cuban treaty.

American Goods.

Finally, it is to be remarked that nowhere in the brief of the Solicitor General, except by inference, does he controvert the contention that the discount should be allowed as to merchandise imported in American bottoms as found by the Court below and even by the Board.

It is respectfully submitted that the petition should be denied.

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